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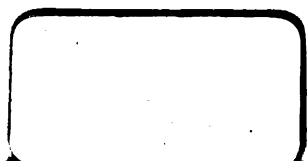
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A TREATISE
ON THE
MEASURE OF DAMAGES;

OR
AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN
THE AMOUNT OF PECUNIARY COMPENSATION
AWARDED BY COURTS OF JUSTICE.

BY
THEODORE SEDGWICK,
AUTHOR OF "A TREATISE ON STATUTORY AND CONSTITUTIONAL LAW."

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A TREATISE
ON THE
MEASURE OF DAMAGES.

CHAPTER XIII.

THE MEASURE OF DAMAGES IN ACTIONS FOR TORTS.

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GENERAL CONSIDERATIONS.

§ 428. *Torts in general.*—Having thus considered the general rules which govern and limit compensation in all cases, we now proceed to consider the special rules applicable in actions of tort; deferring, however, the examination of such torts as affect real estate to a later chapter. The technical forms prescribed by the common law for the redress of wrongs, or, as they are termed, actions *ex delicto*, were *trover*, *case*, *trespass*, *replevin*, and *detinue*.¹ The divisions of the system in this respect were arbitrary; there being many actions nominally in tort, which in respect to the measure of relief, were treated as virtually actions *ex contractu*; and in these cases a fixed rule of damages has always been adhered to. In all cases of tort where no question of fraud,

¹ The old action of *detinue* is of comparatively rare occurrence, and is frequently abolished by statute.

Grotius thus begins his chapter: *De Damno. Supra diximus ejus quod nobis debetur fontes esse tres; pactionem—maleficium—legem. De pactionibus satis*

tractatum. Veniamus ad id quod ex maleficio naturaliter debetur. Lib. ii, cap. 17, § 1, *De Jure Belli et Pacis*. Grotius treats only of *Damnum*, under this head of *Maleficium*. *De Jure Belli et Pacis*. lib. ii, cap. 17.

malice, or oppression intervenes, the measure of compensation is determined by fixed rules. So in an action of trespass without any circumstances of aggravation, the Supreme Court of the United States said that, the case not being one which called for vindictive or exemplary damages, the plaintiff was only entitled to recover for his actual injury.¹ So the Supreme Court of New Jersey said in an action of *trespass quare clausum fregit*: "In actions of trespass, where the plaintiff complains of no injury to his person or his feelings; where no malice is shown; where no right is involved beyond a mere question of property; where there is a clear standard for the measure of damages, and no difficulty in applying it, the measure of damages is a question of law, and is necessarily under the control of the court."² And so again in North Carolina, in an action for trespass for destroying a building by fire, the jury at Nisi Prius were directed that the measure of damages was not the value of the building, but the amount it would have taken to rebuild it if destroyed. But this, on review, was held wrong; and the court said: "The proper measure in actions of this kind, is the real value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages. But whether they should have been given or not was a question which ought to have been submitted with proper instructions to the jury."³

§ 429. Measure of relief independent of form of action.—

* It follows, from what has been said, that in the cases of wrongs such as we now proceed to consider, the measure of relief does not depend on the form of the action;

¹ *Conrad v. The Pacific Ins. Co.*, 6 Peters, 262, 282. See, also, *Bell v. Cunningham*, 3 Peters 69; *Tracy v. Swartwout*, 10 Peters, 80, 95.

² *Berry v. Vreeland*, 21 N. J. L. 183.

³ *Wylie v. Smitherman*, 8 Ired. 236.

whether case or trespass would have been the proper form of action at common law, if no aggravation be proved, the rule of damages is a question of law; though it is always competent to show those circumstances of evil motive which, as we have already seen, go to place the subject of relief largely within the control of the jury. In regard to this class of cases generally, it will be noticed that the object is to limit relief to compensation, as that term is legally understood; and we shall find, therefore, that while the power of the jury over the subject in cases of aggravation is fully recognized, still, even where such facts are presented, if evidence has been admitted or directions given at the trial, which, had the intention of the jury been to give compensatory and not vindictive damages, would have been incorrect, the court, assuming that such was the purpose of the jury, will exercise their control over the subject. "We consider the law," says the Superior Court of New York, "as properly and wisely settled, that the quantum of damages, with the exception of cases in which exemplary or vindictive damages may properly be given, is strictly a question of law; so that the jury are bound by the rule which the judge directs them to follow."¹ In an early case in Pennsylvania, for running down a ship, it was intimated that where the act complained of was purely fortuitous, the jury might give less than the value of the property; but if there be any right of action, the least compensation is certainly the value of property taken or destroyed.¹ **

In *Milwaukee & S. P. Ry. Co. v. Arms*,^(*) Mr. Justice Davis said: "It is undoubtedly true that the allowance

¹ *Suydam v. Jenkins*, 3 Sandf. 614, 628, *per* Duer, J. See, also, *Baker v. Wheeler*, 8 Wend. 505.

² *Bussy v. Donaldson*, 4 Dall. 206.

(*) 91 U. S. 489; *acc.* *Swayne, J.*, in *Oelrichs v. Spain*, 15 Wall. 211, 230.

of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may, in certain cases, be assessed." This being so, the same rules of compensation should apply in contract and in tort. The decided cases are generally to this effect, and this is the tenor of Judge Rapallo's remarks, in *Baker v. Drake*.^(*)

§ 430. **Aggravation and mitigation.**—We have already seen ^(b) that where the amount of compensation is wholly or in part in the discretion of the jury, the circumstances attending the injury may be shown for the purpose of enhancing or mitigating the damages. It is to be observed, however, that whether the action be in tort or in contract, if the damages are measured entirely by the value of property, or by the amount of injury to property, no circumstances can be shown for this purpose.

§ 431. **Joint wrong-doers.**—In an action of tort the damages are not divisible. There can be but one verdict and for one amount against all of those found guilty. All are principals; and each defendant is liable for all the damages

(*) 53 N. Y. 211, 216. The dicta to the effect that a more liberal rule applies in torts than in contracts (see especially *Allison v. Chandler*, 11 Mich. 542; *Walsh v. Chicago, M. & St. P. Ry. Co.*, 42 Wis. 23) can hardly be sustained. They will generally be found to be cases against carriers in which the courts, attempting to follow *Hobbs v. London & S. W. Ry. Co.*, L. R. 10 Q. B. 111, have been led to interpret the rules of *Hadley v. Baxendale* as generally allowing damages for all natural consequences, but as *limiting* damages in cases of contract to such as are within the contemplation of the parties; this distinction is founded on the assumption (now generally conceded to be erroneous) that the field covered by the contemplation of the parties fixes a sort of conventional or contractual measure, including less than the natural or normal rule.

(b) § 51.

sustained, without regard to different degrees or shades of wrong-doing.^(*) The fact that one of the defendants received only a small proportion of the proceeds of the tort, or none at all, does not lessen the recovery against him.^(b) So, where all the defendants, in an action charging them with a joint trespass, are defaulted, and the case referred to an assessor to assess the damages, they are all liable for the whole damage actually sustained by the plaintiff, although it appears, by the evidence before the assessor, that one of them did not participate in the trespass.^(c) But where the tort is really made up of several tortious acts, each defendant is liable only for those in which he participated. In an action for the wrongful seizure of the plaintiff's cattle, *Fleming*, one of the defendants, had recovered a judgment against a brother of the plaintiff, on which the execution was issued; *Fleming*, with her attorney in that suit, who had directed the wrongful seizure, were joined as defendants. A verdict was found against both defendants for £83 15s. 10d. Of this £25 was for the seizure; and the rest was the amount of the costs ordered against the defendant *Fleming* in an interpleader suit, which had been had to try the title to the cattle. An order had been made in that suit that *Fleming* pay those costs, and as this order was equivalent to a judgment, it was held that the judgment against *Fleming* must be reduced by that amount. And as the plaintiff could not recover these costs against her, and could not recover against her attorney any other damages than he was entitled to against her, the court reduced the verdict by the

(*) *Beal v. Finch*, 11 N. Y. 128; *Posthoff v. Bauendahl*, 43 Hun 570; *Grantham v. Severs*, 25 Up. Can. Q. B. 468; *Barker v. Westover*, 5 Ont. 116.

(b) *Stix v. Keith*, 85 Ala. 465; *Crumb v. Oaks*, 38 Vt. 566; *Macklem v. Durrant*, 32 Up. Can. Q. B. 98; *McMillan v. Fairley*, 1 Han. 325.

(c) *Gardner v. Field*, 1 Gray 151.

amount of the costs.^(*) Where damage is done by cattle belonging to different owners, each owner is liable for the damage done by his own cattle, and for no more; and in the absence of all proof as to the amount of damage so done, the law will infer that the cattle did equal damage.^(b)

INJURY TO PERSONAL PROPERTY.

§ 432. General rule.—We proceed now to notice the general rules which govern in trespass for taking or injuring personal property. Where personal property is taken or injured, the remedy at common law was by an action of trespass *de bonis asportatis*, or by an action on the case. As has been seen, however, the form of action should cause no difference in the measure of damages; and the distinction has in fact been very generally abolished under the modern systems of pleading. In this discussion injuries which would formerly have been remedied by an action of trespass and those where case would have been brought have been grouped together, no distinction being noted. It has been often decided, that where trespass is brought for personal property, and no circumstances of aggravation are shown, the action is to be regarded as similar to one of conversion, and the value of the property, with interest, furnishes the measure of damages.^(c) In a case in Massachusetts, trespass was

(*) *Power v. Fleming*, 4 Ir. R. (C. L.) 404.

(b) *Partenheimer v. Van Order*, 20 Barb. 479.

(c) *The Henry Buck*, 39 Fed. Rep. 211; *Louisville & N. R.R. Co. v. Kelsey*, 89 Ala. 287; *St. Louis, I. M. & S. Ry. Co. v. Biggs*, 50 Ark. 169; *Dorsey v. Manlove*, 14 Cal. 553; *Oviatt v. Pond*, 29 Conn. 479; *Gilson v. Wood*, 20 Ill. 37; *Toledo, P. & W. Ry. Co. v. Johnston*, 74 Ill. 83; *Yarborough v. Nettles*, 7 La. Ann. 116; *Schindel v. Schindel*, 12 Md. 108; *Briscoe v. McElween*, 43 Miss. 556; *Walker v. Borland*, 21 Mo. 289; *Funk v. Dillon*, 21 Mo. 294; *State v. Smith*, 31 Mo. 566; *Felton v. Fuller*, 35 N. H. 226; *Hopple v. Higbee*, 23 N. J. L. 342; *Campbell v. Woodworth*, 26 Barb.

brought for destroying game-cocks, which had been taken by a public officer acting on an erroneous construction of the statute against gaming. It was held that, though cock-fighting is in that State illegal, the sale of game-cocks is lawful; and that the measure of the plaintiff's damages was "what the cocks were worth to him as articles of merchandise or sale, whether the market for them was to be found in this commonwealth or elsewhere."¹ So where property of the plaintiff was sold by the defendant on an execution which was afterwards reversed on appeal, the measure of damages was the value of the property at the time of the sale.^(a)

§ 433. Value, how estimated.—The market value of the property, with interest from the time of the trespass, not its value to the plaintiff, is usually said to be the measure.^(b) So where the defendant had carried off some corn belonging to the plaintiff, it was held that the market value at the time of taking was the measure of damages, and the plaintiff could not show that he had a contract to deliver that corn, and what it was worth to him under that contract, "especially in the absence of knowledge of such contract by defendant."^(c) But this is subject to the qualifications heretofore pointed out that the *value* is the fundamental rule, that the market price is only one of the evidences of this value, and the value as between plaintiff and defendant may according to circumstances be higher

¹ Coolidge v. Choate, 11 Met. 79.

648; Fernwood M. H. A. v. Jones, 102 Pa. 307; Josey v. Wilmington & M. R.R. Co., 11 Rich. 399; Burke v. Louisville & N. R.R. Co., 7 Heisk. 451; Gulf, C. & S. F. Ry. Co. v. Keith, 74 Tex. 287; Gray v. Stevens, 28 Vt. 1; Maxwell v. Crann, 13 Up. Can. Q. B. 253; Sweeney v. Port Burwell Harbour, 17 Up. Can. C. P. 574.

^(a) Smith v. Zent, 83 Ind. 86.

^(b) Gardner v. Field, 1 Gray 151; Pacific Ins. Co. v. Conard, 1 Bald. 138.

^(c) Brown v. Allen, 35 Ia. 306.

or lower than the market. So where the assignees of a bankrupt sold fixtures on leased premises belonging to the plaintiff, for £36, a fair price on such sale, but it was shown that, as between incoming and outgoing tenant, the value would have been £80, it was held that the plaintiff was entitled to recover the latter sum.¹

§ 434. Value, when estimated.—The question as to the time when the value is to be computed, whether at the time of the illegal act, or at any subsequent period, if the value has fluctuated, presents itself in actions of trespass. In *Crouch v. London & N. W. Ry. Co.*² it seems to have been assumed that the period fixing the right of the parties was that of the trespass, and it has been so stated by the Supreme Court of New York;³ and this is now the established rule.^(*) Where defendant's cattle destroyed plaintiff's corn, the measure of damages was held to be the value of the corn at the time of the trespass, and not the value it would have had if it had matured.^(b)

§ 435. Injury less than destruction.—Where a trespass upon the property of the plaintiff results in a less injury than destruction or deprivation of the property, the rule stated does not apply; the difference in value of the property before and after the injury is usually the measure.^(c) Thus where the goods of the plaintiff were seized by the defendant, but the plaintiff's possession was not disturbed and he continued to have the use of them, his damages are the amount of his injury.^(d) Where the plaintiff's property was taken out

¹ *Thompson v. Pettitt*, 10 Q. B. 101. ³ *Brizsee v. Maybee*, 21 Wend. 144.

² 2 C. & K. 789.

(*) *Pacific Ins. Co. v. Conard*, 1 Bald. 138; *Brannin v. Johnson*, 19 Me. 361.

(b) *Richardson v. Northrup*, 66 Barb. 85.

(c) *St. Louis, I. M. & S. Ry. Co. v. Biggs*, 50 Ark. 169; *Davidson v. Michigan C. R.R. Co.*, 49 Mich. 428.

(d) *Bayliss v. Fisher*, 7 Bing. 153.

of his possession, and afterwards returned to him, he may recover the value of the use of the property during the period of detention and compensation for injury to the property.^(*) So where the plaintiff's property was injured, he may recover the expense of restoration of the property to health or soundness, compensation for the loss of use of it during the period of disability, and the amount of the difference, if any, between its value before the injury and after the cure or repair.^(b) So if the plaintiff's animal is killed by the defendant, since the carcass remains the plaintiff's property, his recovery is limited to the difference in value between the live animal and the carcass.^(c)

§ 436. **Consequential damages.**—As a rule, when interest is given, this represents the sum total of redress for the *consequences* of the loss, and hence consequential damages, as such, are not recoverable.

* In Maine, in an action of trespass *de bonis asportatis*, it was ruled, at the trial, that the jury should give the value of the property at the time it was taken, and *something for the detention*. But, on motion for a new trial, the court said :

“For an injury done to property, such as is this case, the value of the property at the time of the injury is the measure of damages. There may be circumstances enhancing that value to the party injured, which may be properly taken into account. To

(*) *Turner v. Younker*, 76 Ia. 258; *Haviland v. Parker*, 11 Mich. 103; *Benson v. Connor*, 6 Up. Can. C. P. 356.

(b) *Atlanta & W. P. R.R. Co. v. Hudson*, 62 Ga. 679; *Streett v. Laumier*, 34 Mo. 469; *Missouri R. P. Co. v. Hannibal & St. J. R.R. Co.*, 79 Mo. 478.

(c) *Georgia P. R.R. Co. v. Fullerton*, 79 Ala. 298; *Memphis & C. R.R. Co. v. Hembres*, 84 Ala. 182; *Case v. St. Louis & S. F. R.R. Co.*, 75 Mo. 668; *Harrison v. Missouri P. Ry. Co.*, 88 Mo. 625; *Roberts v. Richmond & D. R.R. Co.*, 88 N. C. 560; *Boing v. Raleigh & G. R.R. Co.*, 91 N. C. 199; *Godwin v. Wilmington & W. R.R. Co.*, 104 N. C. 146.

the value here, interest might be added as a part of the plaintiff's indemnity. But as the term *interest* was not used, and probably not intended as the limit of damages for *detention*, the jury were at liberty to go into an estimate of the probable or speculative loss the plaintiff might have sustained on this ground. In our judgment, the instruction was too vague and loose, and had a tendency to mislead the jury."¹

So, in Texas, in an action of tortious conversion analogous to that of trover, where, although there was no other evidence of damage than the value of the property, and no proof of fraud, violence, or malice, yet the jury had given double the value, the verdict was set aside.²

In an action of trespass, on the Pennsylvania circuit, the whole subject was very ably discussed by Mr. Justice Baldwin.³ The plaintiffs lent \$60,000 to one E. Thompson, who took bills of lading of a cargo of tea, and assigned them to the plaintiffs. The teas bought were shipped to Philadelphia, where they were taken on a *feri facias* at the suit of the United States against Thompson. The defendant was the marshal who made the levy. As to the rule of damage, it being settled⁴ that the plaintiffs were the legal owners of the teas, and not to be regarded as mere mortgagees, Baldwin, J., charged the jury as follows:

"The rule which ought to govern jurors in assessing damages for injuries to personal property, depends much on the circumstances of the case. When a trespass is committed in a wanton, rude, and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured, in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of

¹ Brannin v. Johnson, 19 Me. 361.

² Smith v. Sherwood, 2 Tex. 460.

³ Pacific Insurance Co. v. Conard, 1 Baldwin 138, 142.

⁴ Conard v. Atlantic Ins. Co., 1 Pet.

386; Conard v. Nicoll, 4 Pet. 291.

the act. In such cases, there is no certain fixed standard ; for a jury may properly take into view not only what is due to the party complaining, but to the public, by inflicting, what are called in law, speculative, exemplary, or vindictive damages. But when an individual, acting in pursuance of what he conceives a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if, after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the trial, is generally considered as the extent of the damages sustained ; and this is deemed legal compensation, which refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages *resulting to the owner*, by the trespass. These are taken into consideration only in a case more or less aggravated. But where the party taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case, the defendant acted under the orders of the government, in execution of his duties as a public officer ; he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him ; he has taken the property of the plaintiffs for the debt of Edward Thomson, and must make them compensation for the injury they have sustained thereby, but no further.

“It has long since been well settled, that a jury ought in no case to find exemplary damages against a public officer, acting in obedience to orders from the government, without any circumstance of aggravation, if he violates the law in making a seizure of property. In the case of Nicoll against the present defendant, Judge Washington instructed the jury that they might give the plaintiff such damages as he had proved him-

self to be justly entitled to, on account of any actual injury he had proved to their satisfaction he had sustained by the seizure and detention of the property levied on ; but that they ought not to give vindictive, imaginary, or speculative damages. The affirmance of his charge makes it the guide for us in this case. Our true inquiry, then, must be : What damages have the plaintiffs so proved themselves to be entitled to ?

"There can be no doubt that they have a right to the value of the teas at the time of the levy, with interest from the expiration of the usual credit on extensive sales. You may ascertain the value from the sales made at New York or this place, in the spring of 1826. If, in your opinion, they afford evidence of their real value, or if you are satisfied, from the evidence you have heard, that the seizure and storing of these teas had the effect of depressing the prices, you may make such additions to the prices at which sales were actually made, as would make them equal to what they would have been, had they come to the possession of the plaintiffs at the time of the levy. . . .

"It is in the sound discretion of courts of admiralty to allow or refuse counsel fees, according to the nature of the case, either as damages or a part of the costs, as in the case of the *Apollo* ;¹ but, by a late case, they were allowed as costs in a case where it was adjudged by the Supreme Court that no damages could be claimed. They form an item of costs in such courts, but not in courts of common law. It would be legislation by the common-law courts to order them to be taxed as costs. The expenses of prosecuting claims of the present description do not come within the principles established by the courts in causes of admiralty jurisdiction, but seem to be considered as extra damages, beyond the value and interest, where there is aggravation, but not otherwise.

"I think it is a safe rule in common-law actions of trespass, and can perceive no sound reason for holding a marshal to a harder rule of damage than a naval or revenue officer, or the owner of a privateer. The same principle ought to govern all alike ; or if any discrimination prevails, it should be in favor of the defendant, who could use no discretion, but was bound to do the act which has exposed him to this action.

"The case of *Woodham v. Gelston*,² seems to me to be based on this rule ; and the damages recovered in that case were only

¹ 9 Wheat. 362, 376.

² 1 Johns. 134, 137.

such as related to the property. The marshal fees were for seizing and keeping possession of the vessel. On the restoration to the plaintiff, he paid them; they were a charge on the property, in the nature of storage and bailment. In sanctioning this item, the court seem to put it on the ground of its being a charge on the defendant; and having been paid by the plaintiff, he was entitled to recover it back. But, they say, if it had been a mere voluntary payment, a deduction would have been proper. The other items were for wharfage and ship-keeping, which were disallowed, because they were after the restoration. These were all the claims for expenses presented in that case, and they all attached to the property taken; none related to personal expenses in prosecuting the suit.

"In declaring that voluntary payments shall be deducted, the court settled the principle as to the right to charge for the marshal's fees. They held the jury to strict rules; for they struck out an item of compound interest allowed by the verdict.

"On the principle of this case of *Woodham v. Gelston*, the charges of the auction sales are allowable; because such sale had become necessary, and the expenses thereof became a charge on the teas. Also fire insurance, which is a substitute for bailment, and the premium paid in place of storage.

"It is all-important that, in matters of this kind, the principle which governs them should be fixed and uniform. If we once begin to diverge from the old line, it will be difficult to draw and define a new one with accuracy. It may be thought a hardship that the plaintiffs shall not be allowed their actual disbursements in recovering this property; but the hardship is equally great in a suit for money lent, or to recover possession of land; they are deemed in law losses without injury, for which no legal remedy is afforded.

"I am, therefore, of opinion that you cannot, in assessing damages in this case, allow any of the items claimed by the plaintiffs for disbursements; they being consequential losses only, and not the actual or direct injury to their property which they have sustained by its seizure and detention, for which alone they are entitled to recover damages in this case, it not being attended with any circumstances of aggravation on the part of the defendant. Had there been any such, a very different rule would have been applied, by reimbursing the plaintiffs to the full extent of all their expenses and consequential losses.

" You will, then, carefully weigh all the evidence in the cause, and ascertain the true value of the teas at the time of the levy, or when they could have come into market by the rules of the custom-house, if there had been no claim asserted to them by the United States other than for the duties with interest ; deducting therefrom the net amount of sales after payment of duties and charges of sales, the balance will be the amount to which the plaintiffs will be entitled." ' **

So, in trespass for taking corn, it will not be permitted the plaintiff to show that, in consequence of the alleged illegal act, he was obliged to work as a day laborer, to obtain the means to purchase more corn. " Such testimony," says the Supreme Court of Alabama, " tends to establish a criterion of damages too remote and disconnected with the act done, and supposes the rule to fluctuate according to the poverty of the plaintiff." ¹ So, again, in trespass for taking the plaintiff's goods in execution under a warrant of attorney and judgment, which were afterwards set aside as illegal, it was held in the English Queen's Bench, that the plaintiff cannot claim, as part of the damage, his costs incurred in vacating the warrant of attorney and judgment ; Lord Denman saying : " The plaintiff might have recovered these costs in a proper form of proceeding, but he cannot sue the defendant for a trespass *per quod* he was put to expense in removing the cause of the trespass." ² A verdict for profits which might have been made on the goods wrongfully taken, in addition to their value, is erroneous. ^(*) In an action of trespass for causing the death of a slave by whipping, it was held error to charge the jury that they might look to the hire of the slave, as well as to the value, in estimating the damages. ^(b)

¹ See this case cited with approbation in an analogous case in Iowa. *Thomas v. Issett*, 1 Greene (Ia.) 470.

² *Sims v. Glazener*, 14 Ala. 695.

³ *Holloway v. Turner*, 6 Q. B. 928.

^(*) *Butler v. Collins*, 12 Cal. 457.

^(b) *Fail v. Presley*, 50 Ala. 342.

On the other hand, where the driver of a street-car negligently attempting to pass the horse and wagon of an expressman, which had been temporarily left in the city street near the curbstone, the car was brought into contact with the wagon, and the horse, having been thrown in consequence on the curbstone and against a tree, received a fatal injury, compensation for the loss of the profits of the plaintiff's business during the time reasonably necessary to enable him to select another horse, was allowed to be included in the damages recovered by him.^(*) Such loss of profits would be of course incompatible in the allowance of interest, for they represent the value of the use.

§ 437. **Expense of avoiding consequences.**—The reason of this rule does not, however, apply in all cases. It will often happen, as for instance in the case already discussed, where the injury is less than a total destruction, or where there is a doubt whether it will amount to total destruction, that consequential damages will be allowed. Under this head would fall all allowances for expenses incurred by the plaintiff in an attempt to avoid the consequences of the trespass.

So in New York it has been held that in an action on the case for the wrongful detention of personal property, the plaintiff might recover damages for the time lost and expenses incurred in pursuit of the property.¹ In an action for injury to cattle which necessitated their being killed, it was held that the plaintiff was entitled to a reasonable allowance for his time and trouble in disposing

¹ *Bennett v. Lockwood*, 20 Wend. 223.

(*) *Albert v. Bleecker St. R.R. Co.*, 2 Daly 389; but see *contra*, *McLaughlin v. Bangor*, 58 Me. 398, where interest on the amount allowed as damages for injury to property was held all that could be given in accordance with the general rule.

of them, and should be charged with the net proceeds realized, or which might have been realized, after deducting such allowance.^(*) And so the cost of selecting part of cotton bales which was not injured and shipping the same to market should be added to the difference in value.^(b)

§ 438. Recoverable even when it enhances loss.—The rule that the expense of a reasonable attempt to repair the injury may be recovered is not limited to cases where the attempt was successful; if the attempt was a reasonable one, the expense of it may be recovered, although in spite of it the property proved a total loss. In that case, the expense of the attempted repair or cure is recoverable in addition to the value of the property.^(c)

FRAUD.

§ 439. False representations.—Where the plaintiff suffers pecuniary injury through the loss of personal property by the fraud of the defendant, instead of by force, the general principles are the same. The damages recoverable are those which naturally flow from the fraud.^(d) It has been held in Massachusetts, in an action on the case, where the defendant, being part owner of a vessel, by fraudulent representations persuaded the attorney of the plaintiff, during his absence, to sell him the vessel at a less price than its value, and he afterwards himself sold it for

(*) *Dean v. Chicago & N. W. Ry. Co.*, 43 Wis. 305.

(b) *Texas & P. Ry. Co. v. Levi*, 59 Tex. 674.

(c) *The Henry Buck*, 39 Fed. Rep. 211; *Atlanta & W. P. R.R. Co. v. Hudson*, 62 Ga. 679; *Central R.R. Co. v. Warren*, 84 Ga. 329; *Watson v. Lisbon Bridge Co.*, 14 Me. 201; *Gillett v. Western R.R. Corp.*, 8 All. 560; *Streett v. Laumier*, 34 Mo. 469; *Missouri R. P. Co. v. Hannibal & S. J. R.R. Co.*, 79 Mo. 478; *Gulf, C. & S. F. Ry. Co. v. Keith*, 74 Tex. 287; *Sweeney v. Port Burwell Harbour*, 17 Up. Can. C. P. 574.

(d) *Buschman v. Codd*, 52 Md. 202; *Estell v. Myers*, 54 Miss. 174.

a greater price, that if the latter sale was an actual sale, the sum realized at it would be the proper measure of damages ; “because it would be unjust to permit the fraudulent party to retain the fruits of his fraud,” and because the plaintiff, if not deceived, might have obtained the larger sum. But the court allowed the defendants to show that the price which they paid was the true and full value of the plaintiff's share, both in order to disprove the fraud, and as proper for the consideration of the jury on the question of damages.¹

Where the defendant falsely represented a third party to be of good credit, whereupon the plaintiff sold him goods on credit and was unable to recover the price, the measure of damages is the value of the goods supplied.^(a) Where by the defendant's fraudulent representations the plaintiff is induced to take out a policy of life insurance, which he surrendered upon discovering the fraud, the measure of damages is the amount of premiums paid.^(b) Where by the defendant's false representations the plaintiff is induced to subscribe to bank stock and to give his bond to secure the subscription, the bank being insolvent and the bond having been assigned for value, the measure of damages is the amount of the subscription, though it is as yet unpaid.^(c) Where one had been induced by the fraudulent representations of another's creditor to take from the debtor certain goods and give the creditor his own note for the debt, and it proved that the goods were worth much less than represented, but it

¹ *Matthews v. Bliss*, 22 Pick. 48. This decision assumes that the object of the jury was merely to give compensatory damages : because, as we have already said, fraud is a case for vindictive or exemplary damages, where such damages are allowed.

(a) *Kidney v. Stoddard*, 7 Met. 252 ; *Bean v. Wells*, 28 Barb. 466.

(b) *Hedden v. Griffin*, 136 Mass. 229.

(c) *Hubbard v. Briggs*, 31 N. Y. 518.

did not appear whether the defendant had received them by way of absolute purchase or as collateral security only, the instruction of the judge to the jury to find for the defendant if the difference in value between the goods as represented and their actual value equalled the balance due on the note, which would have been the rule in the case of an absolute sale, was held inapplicable and therefore erroneous, because if the goods were taken as security only, the defendant should have been held to account on the note for what they were worth.^(*) In an action by a sheriff against parties whose fraudulent representations had induced him wrongfully to seize the property of T., it was held that the measure of damages was the amount of T.'s judgment against the sheriff, with interest.^(b) In an action for a false representation, by which the plaintiff was alleged to have been compelled to pay £2,000, and thereby became bankrupt, and suffered great annoyance and inconvenience, the only damage recoverable was the direct pecuniary loss, the right to which passed to the assignees.^(c) Where, in an action of deceit, property fraudulently sold but retained by the vendee has any value, such value must be allowed the defendant in the assessment of the damages.^(d)

§ 440. Other frauds.—In Kentucky, where suit was brought for fraud in assigning a note for which the plaintiff had given certain property, the court held that the value of the property, and not the amount of the note, was the proper measure of damages; though they considered the precise amount to be recovered by the

(*) *Stevenson v. Greenlee*, 15 Ia. 96.

(b) *Kenyon v. Woodruff*, 33 Mich. 310: the defendants defended T.'s suit for the sheriff.

(c) *Hodgson v. Sidney*, L. R. 1 Ex. 313.

(d) *McLaren v. Long*, 25 Ga. 708.

plaintiff a matter for the consideration and decision of the jury.¹ Where the defendant assigned a note and mortgage, and then fraudulently filed a certificate of satisfaction of the mortgage, the plaintiff's damages were held to be the value of the security, not exceeding the amount of the note.^(*) Where defendant assigned a note secured by a mortgage, and then released the mortgage to one who had bought the land subject to the mortgage, and who then sold it to a *bona fide* purchaser, it was held in an action by the mortgagor that he could recover the amount of the note, although at the time of the commencement of the action the note had not been paid, the court saying that the defendant had fraudulently destroyed the security set apart by the plaintiff for the payment of the note.^(b)

Where the plaintiff was defrauded into making a loan on a mortgage of land which was worth less than the loan, the measure of damages is the difference between the loan and the value of the land.^(c) Where the defendant fraudulently induced the plaintiff to mortgage his farm to one A. for a certain sum, and the defendant agreed with A. to have the amount applied on an old indebtedness from the defendant to A., so that the plaintiff got nothing, the measure of damages was the amount of the mortgage, with interest.^(d) A corporation issued stock to the defendant upon a forged power of attorney; the owner sued the corporation, which notified the defendant, and the owner recovered. The corporation now

¹ *Crews v. Dabney*, 1 Littell 278.

(*) *Fox v. Wray*, 56 Ind. 423.

(b) *Ely v. Stannard*, 46 Conn. 124.

(c) *Briggs v. Brushaber*, 43 Mich. 330.

(d) *Forbes v. Thomas*, 22 Neb. 541. The plaintiff was not allowed to recover the value of his farm, though the mortgage had been foreclosed.

sued the defendant, and the measure of damages was held to be the value of the stock at the termination of the former suit, the expenses of that suit, and the dividends which had been paid to the defendant.^(*) In case of a fraudulent over-issue of stock by the defendant's agent, the measure of damages is the value of the stock at the time the defendant refused to recognize it as valid.^(b) Where the plaintiff in such a case is a broker who had sold the stock for the agent of the defendant and had been obliged to take it up on the customary broker's guaranty of genuineness, he may recover the amount he received upon the sale.^(c) Where the defendant secured by fraud a conveyance of the plaintiff's land, the measure of damages is the value of the land at the time of the conveyance.^(d)

Upon a fraudulent assignment of goods to a creditor, the measure of damages is the value of the goods at that time,^(e) not what the defendant sold them for.^(f) In an action brought by plaintiffs as judgment creditors of defendant Cavanaugh, who had conspired with defendant Strauss to put his property out of reach of his creditors by transferring it to defendant Strauss, it was held that damages to the full amount of plaintiff's claim were proper.^(g) The defendant "was a wrong-doer, and it lies not in his mouth to say that the property may still be taken under execution. It exceeds in value the plaintiff's judgment, and has been fraudulently appropriated by the defendant to his own use. It is just that he

(*) *Boston & A. R.R. Co. v. Richardson*, 135 Mass. 473.

(b) *Allen v. South Boston R.R. Co.*, 150 Mass. 200.

(c) *Jarvis v. Manhattan B. Co.*, 53 Hun 362.

(d) *Woolenslagle v. Runals*, 76 Mich. 545.

(e) *Burpee v. Sparhawk*, 97 Mass. 342.

(f) *Oppenheimer v. Halff*, 68 Tex. 409.

(g) *Quinby v. Strauss*, 90 N. Y. 664.

should pay the creditor whose claim he sought to defeat."

§ 44 I. **Consequential damages.**—* The power of the court over the measure of relief is constantly exercised, even in cases of fraud. This is invariably so as to remote and consequential damages. The rules in this respect we have already considered, and they are uniformly applied in cases of fraud as well as all others. So, in a case in England, where the defendant was sued for false representations in regard to the credit of his son, where it appeared that the plaintiffs had trusted the son for a length of time, and to an amount which might be considered ill-judged and excessive, even if the representations had been true, Tindal, C. J., charged the jury: "As to the damages, the verdict must be for such damage as is justly and immediately referable to the falsehood of the statement. The goods first purchased have been paid for, but six hundred pounds' worth since have not, and the son was made a bankrupt by the plaintiff in the month of October. You must say how much of this is justly and immediately referable to the false statement. That is a problem which you must solve for yourselves. I will only make an observation, and that is, if they give the son an indiscreet and ill-judging credit, they cannot, in fairness, call on the father to be answerable for the loss occasioned by it."¹ The language of the eminent judge is particularly deserving of notice; for if, in cases of this kind, the principles that exclude remote damages are not adhered to, the whole subject of remuneration would be in the hands of the jury.^(*)**

Where the plaintiff, a livery-stable keeper, had taken

¹ *Corbett v. Brown*, 5 C. & P. 363.

(*) See *Collins v. Cave*, 6 H. & N. 131; aff'd 4 H. & N. 225.

the defendant's horse to keep in his stable, relying on the defendant's representation that the horse was well, which was untrue, and the horse having the distemper, communicated it to two stallions of the plaintiff, who were thereby incapacitated for service during the season, it was held, that evidence of what would have been their probable earnings during the season, but for the distemper, was proper for the consideration of the jury in estimating the damages.^(*) In *Sellar v. Clelland* ^(b) it was held, that the plaintiff could recover for cattle lost on a journey which he had been induced to take through the defendant's false representations, and could recover an exceptionally high price he had to pay to replace the cattle lost. In *Fitzsimmons v. Chapman* ^(c) the defendant represented to the plaintiff that a firm, having a large capital and business, could be induced, by the payment of a certain sum, to remove to the plaintiff's town, and, by their business, enhance the value of property in that place. The plaintiff subscribed a certain sum, and the firm moved. It turned out to be insolvent. It was held, that damages, from the fact that it did not enhance the value of property, were too remote. The purchaser of a vessel, falsely and fraudulently represented by the seller as eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, and the vessel being afterwards condemned in a foreign port, it was held that the purchaser was entitled to recover his actual damages occasioned by sending her to sea, not exceeding her value.^(d) Where a horse sold was represented as not being afraid of the cars,

(*) *Fultz v. Wycoff*, 25 Ind. 321.

(b) 2 Col. 532.

(c) 37 Mich. 139.

(d) *Tuckwell v. Lambert*, 5 Cush. 23.

compensation may be recovered for property injured by the horse in running from the cars.^(*)

§ 442. **Expenses.**—In *Slingerland v. Bennett* ^(b) the defendant made fraudulent representations as to the responsibility of the maker of a note given by the defendant to the plaintiff in payment of a debt. It was held, that the plaintiff could not recover the costs of an action against the maker, as these were not the proximate result of the fraud. So, in Connecticut, in an action against the vendor of a horse for false representations, the plaintiff cannot recover the expenses of keeping, previous to an offer to return the horse.¹

SLANDER AND LIBEL.

§ 443. **General rule.**—We now come to a class of torts in which the injury is malicious, and the degree of injury, and therefore the measure of damages, depends to a great extent upon the nature and extent of the malice displayed by the defendant; and matters of aggravation and of mitigation become important. The first actions of this nature to be considered are actions for defamation—slander and libel. The direct injury suffered from a slander or libel is to the reputation; and compensation for injured reputation is therefore the principal item of damages in an action for such an injury.^(c) But another direct result of defamation is mental suffering on the part of the person defamed; and in an action for slander or libel a plaintiff may recover compensation for mental suffering.^(d)

¹ *West v. Anderson*, 9 Conn. 107.

(*) *Allen v. Truesdell*, 135 Mass. 75.

(b) 66 N. Y. 611.

(c) *Blumhardt v. Rohr*, 70 Md. 328; *Markham v. Russell*, 12 All. 573.

(d) *Shattuc v. M'Arthur*, 29 Fed. Rep. 136; *Johnson v. Robertson*, 8 Port. 486; *Blumhardt v. Rohr*, 70 Md. 328; *Markham v. Russell*, 12 All. 573; *Hastings v. Stetson*, 130 Mass. 76; *Mahoney v. Belford*, 132 Mass. 393;

* A very important line of demarcation exists in actions of slander between those defamatory words which are actionable *per se*, and from which damage is presumed to result, and those where, to sustain a suit, special damage must be averred and approved. As, for instance, damage is presumed if a clergyman is charged with intemperance or profligacy, a lawyer with dishonesty, a merchant with bankruptcy, or a physician with ignorance; while, on the other hand, if a charge of want of chastity is made against a woman, no action lies unless she can prove special damage.¹ But in this latter case slight damages have been held sufficient, and the loss of marriage is enough.² Into this distinction it is not proper more fully here to enter; but it is well to remark with reference to the subject of this treatise, that where the plaintiff undertakes to show special damage by the loss of customers in trade, he ought to state in his declaration the names of such customers,³ and he cannot prove that any persons not named in his declaration left off dealing with him in consequence of the words spoken.⁴ **

§ 444. Consequential damages.—In *Georgia v. Keppord* (*) the defendant charged the plaintiff with larceny and adultery. The plaintiff endeavored to show that, in consequence of the slander, his wife left him and began an action for divorce on the ground of inhuman treatment. It was held that the desertion of his wife and the expenses of defending the divorce suit were too remote to be considered as damages from the slander. It seems, however, that if the plaintiff had proved, as he had alleged,

¹ *Bradt v. Towsley*, 13 Wend. 253.

² *Moody v. Baker*, 5 Cow. 351; *Linney v. Maton*, 13 Tex. 449.

³ *Hartley v. Herring*, 8 T. R. 130.

⁴ *Hallock v. Miller*, 2 Barb. 630.

Chesley v. Tompson, 137 Mass. 136; *Newman v. Stein*, 75 Mich. 402; *Rea v. Harrington*, 58 Vt. 181.

(*) 45 Ia. 48.

that the words were uttered to induce his wife to leave him, damages for this could have been recovered. It seems that writing of the plaintiff that he "was the ring-leader of the nine-hours' system," cannot be considered likely to produce any damage to the plaintiff.^(a) In this case, the plaintiff alleged that, by reason of the libel, he was prevented from obtaining employment at his trade. In *Prime v. Eastwood* ^(b) it was held that damages from repetition of the slander by others than the defendant were too remote. In Scotland, in *Leven v. Young*,¹ an action for defamation, in consequence of which the plaintiff was removed from his office, which was one dependent on the will of his superiors, it was held that the jury must take into consideration both the nature and tenure of the office, and not give the value of an annuity certain. Where, in an action by a surgeon for a slander imputing that a female servant had a bastard child by him, in consequence of which one who had engaged him as accoucheur would not employ him, and the plaintiff was otherwise injured in his business, it was held that although his damages should not be confined to the fee lost in the special instance, he could not recover for a general loss of business caused by repetitions of the slander by third persons, which could not have arisen directly from the speaking of the words by the defendant.^(c)

§ 445. **Aggravation—Social and pecuniary position of the parties.**—Evidence may be given of the defendant's pecuniary circumstances, and his position and influence in society. The defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of

¹ 1 Murray, 350, 384.

^(a) *Miller v. David*, L. R. 9 C. P. 118.

^(b) 45 Ia. 640.

^(c) *Dixon v. Smith*, 5 H. & N. 450.

the injury from his slanderous speech.^(*) In *Brown v. Barnes* ^(b) it was said that the jury should be cautioned against considering it except as bearing on the injury likely to flow from slanders uttered by a man of the defendant's standing. Where a libel is published in a newspaper, the circulation of the paper, and its character and standing, may be shown; but not the wealth of the defendant, its proprietor, where no exemplary damages are to be given.^(c) In *Storey v. Early* ^(d) the court says:

"The extent of the circulation of the newspaper of defendant, and the character and standing of that newspaper for fairness, justice, and truth, might well be considered upon that question. The wealth of the publisher might be great, and his social standing high, and yet the paper might be of such character as to exert but little influence upon the public mind. On the other hand, the publisher might be insolvent, and his position in society very low, and yet the paper might be very attractive and have a very large circulation, and enjoy the confidence of the public to such a degree, for justice and truth, that statements in its columns might carry great weight."

(*) *Broughton v. McGrew*, 39 Fed. Rep. 672; *Bennett v. Hyde*, 6 Conn. 24; *Barber v. Barber*, 33 Conn. 335; *Hosley v. Brooks*, 20 Ill. 115; *Wilson v. Shepler*, 86 Ind. 275; *Karney v. Paisley*, 13 Ia. 89; *Humphries v. Parker*, 52 Me. 502; *Stanwood v. Whitmore*, 63 Me. 209; *Wilms v. White*, 26 Md. 380; *Brown v. Barnes*, 39 Mich. 211; *Trimble v. Foster*, 87 Mo. 49; *Lewis v. Chapman*, 19 Barb. 252; *Fowler v. Chichester*, 26 Oh. St. 9; *M'Almont v. M'Clelland*, 14 S. & R. 359; *contra*, *Ware v. Cartledge*, 24 Ala. 622; *Morris v. Barker*, 4 Harr. 520; *Palmer v. Haskins*, 28 Barb. 90. In *Buckley v. Knapp*, 48 Mo. 152; *Adcock v. Marsh*, 8 Ired. 360; and *Hayner v. Cowden*, 27 Oh. St. 292, it was said that this evidence was material as bearing on the question of exemplary damages. But see *Alpin v. Morton*, 21 Oh. St. 536, where it is said that it shows the plaintiff's injury. In slander for imputing "larceny," the fact that the plaintiff was a clergyman cannot be considered by the jury in enhancement of the damages, where there is no averment on his part in the pleadings to that effect, and no claim or proof of special damages on that ground. *Gandy v. Humphries*, 35 Ala. 617.

(b) *Brown v. Barnes*, 39 Mich. 211.

(c) *Storey v. Early*, 86 Ill. 461; *Rosewater v. Hoffman*, 24 Neb. 222.

(d) 86 Ill. 461, 465.

The evidence is clearly of a nature to tempt the jury into giving excessive damages; and much opposition has been shown toward the doctrine. It is urged with force that the slander receives its added force not from the defendant's wealth, but from his character, and that the latter, not the former, should be shown. In *Palmer v. Haskins* (*) Marvin, J., said:

"The question, so far as principle is concerned, hinges upon the assumption that wealth influences the rank in society of its possessor, and that the slander of a man of rank and influence is more injurious than the slander of one of less influence. It may be admitted that the slander of a man of high character and influence would be more destructive to the character of the party slandered than the slander of one without character and influence. Hence the character and standing in society of the defendant have long been admitted in evidence in this class of cases. But I am not satisfied that wealth is a necessary ingredient to constitute character, standing, and influence in society. It may form an element in fixing character and influence, but not necessarily. Why not limit the inquiry, then, to the question, what are the character, standing, and influence of the defendant in the society where the slander was uttered?" (b)

Since it is the influence of the defendant's wealth on the mind of the hearers that aggravates the offense, rather than the mere possession of wealth, it has been held in Maine that proof should be made of the general reputation of the defendant for wealth *in the place where the slander was uttered*, rather than the amount of property he in fact possesses. (c) But perhaps the best solution of the question is that all facts bearing on character, standing, and influence should go to the jury, subject to a charge that they must only consider them *in this bearing*. The poverty of the plaintiff cannot be

(*) 28 Barb. 90, 92.

(b) *Acc. Justice v. Kirlin*, 17 Ind. 588.

(c) *Stanwood v. Whitmore*, 63 Me. 209.

shown in aggravation ;^(*) but his social position and standing may be shown, that the jury may properly estimate compensation for injury to them.^(b)

§ 446. Repetition.—No damages are usually allowed to be given in slander for any repetition of the defamatory words by the defendant subsequent to the commencement of the suit. Such repetition may be, in some cases, shown in order to prove the character of the original transaction, and the motives of the defendant,^(c) but not with a view to enhancing the damages by obtaining any relief for the new injury.¹ So it has been held in Pennsylvania, that while the jury may consider the degree of malice with which the words were spoken in assessing the damages, as shown by the subsequent acts and declarations of the defendant, they cannot give damages for such acts or declarations, however infamous or criminal they might be.^(d) But in some jurisdictions it is held that though other charges of a similar nature made against the plaintiff by the defendant cannot be shown in aggravation,^(e) yet a subsequent

¹ *Pearson v. Lemaitre*, 5 Man. & Gr. 700; *Schoonover v. Rowe*, 7 Blackf. 202.

(*) *Case v. Marks*, 20 Conn. 248; *Perrine v. Winter*, 73 Ia. 645; *Reeves v. Winn*, 97 N. C. 246; *contra*, *M'Almont v. M'Clelland*, 14 S. & R. 359 (*semble*).

(b) *Peltier v. Mict*, 50 Ill. 511; *Wilson v. Shepler*, 86 Ind. 275; *Clements v. Maloney*, 55 Mo. 352; *Klumph v. Dunn*, 66 Pa. 141; but *contra*, *Prescott v. Tousey*, 50 N. Y. Super. Ct. 12.

(c) *Ward v. Dick*, 47 Conn. 300; *Stowell v. Beagle*, 79 Ill. 525; *Hinkle v. Davenport*, 38 Ia. 355; *Ellis v. Lindley*, 38 Ia. 461; *Rea v. Harrington*, 58 Vt. 181. In *Vincent v. Dixon*, 5 Ind. 270, they were not allowed to be proved in aggravation where they were not alleged in the declaration. In *Saunders v. Baxter*, 6 Heisk. 369, it was said that subsequent publications of a libel could only be given in evidence when they contain an explanation or confession of the former publication, or an express admission of malice.

(d) *Sitzell v. Reynolds*, 67 Pa. 54.

(e) *Schenck v. Schenck*, 20 N. J. L. 208; *Frazier v. McCloskey*, 60 N. Y. 337. Unless such charges cannot form the subject of an action on account

repetition of the very slander sued on may be shown to aggravate damages. (*)

§ 447. *Plea of justification.*—It has been held that an unsuccessful plea of justification was a good ground for increasing the damages. But the inclination of the later cases is against this idea; which, in truth, leads to an effort to punish what may be a perfectly innocent act. So, in Indiana, in slander for perjury, if the defendant plead the truth of the words in justification, and fail to prove the plea, the filing of that plea is not an aggravation; and, on the contrary, if, from the evidence, it appear that the defendant, though he cannot strictly justify, had reason to believe, from the plaintiff's conduct, that the charge was true, such fact may go to the jury in mitigation of damages.¹ So, in Tennessee, an invalid and insufficient plea of justification in an action of slander upon which no judgment could have been entered, is entitled to no weight in aggravation of damages under the plea of not guilty.²

The decisions upon this point are, however, not in harmony. In some jurisdictions it is held that such a plea is evidence of actual malice, and a high aggravation of the offense.^(b) So, in Vermont, it is competent for

¹ *Byrket v. Monohon*, 7 Blackf. 83. ² *Braden v. Walker*, 8 Humphreys 34.

of the statute of limitations: *Inman v. Foster*, 8 Wend. 602; *Titus v. Sumner*, 44 N. Y. 266. In such a case it is said that they are allowable to show *animus*; if they might still serve as a cause of action, the jury might be influenced to give damages twice for the same matter.

(*) *Darby v. Ouseley*, 1 H. & N. 1; *Hatch v. Potter*, 7 Ill. 725; *Stowell v. Beagle*, 79 Ill. 525; *Leonard v. Pope*, 27 Mich. 145; *Williams v. Harrison*, 3 Mo. 411; *Johnson v. Brown*, 57 Barb. 118.

(b) *Simpson v. Robinson*, 12 Q. B. 511; *Robinson v. Drummond*, 24 Ala. 174; *Pool v. Devers*, 30 Ala. 672; *Downing v. Brown*, 3 Col. 571; *Henderson v. Fox*, 83 Ga. 233; *Jackson v. Stetson*, 15 Mass. 48; *Clark v. Binney*, 2 Pick. 113, 121; *Doss v. Jones*, 5 How. Miss. 158; *Gorman v. Sutton*, 32 Pa. 247; *Burckhalter v. Coward*, 16 S. C. 435; *Wilson v. Nations*, 5 Yerg. 211; *Faucitt v. Booth*, 31 Up. Can. Q. B. 263.

the jury, on the question of damages, to take into consideration the fact that the defendant, in his pleadings, has repeated and attempted to justify his statements.^(*) On the other hand, in other jurisdictions, such a plea, interposed in good faith, is no ground for increasing the damages.^(b) As just stated, we think the last rule is the true one, and that the plea should not, as matter of law, carry with it any effect of aggravation. The necessity of such a consequence may prevent an honest defense. As was said, in *Rayner v. Kinney*, the motive with which the justification is pleaded, should be "for the consideration of the jury. If they find that it was done with the intention to injure the plaintiff, they may rightly consider it an aggravation of the damages; but where no wrongful intention is found, there is no just ground for the punishment of the defendant." In New York, the severer rule formerly obtained,^(c) although, before the Code of Procedure, it had perhaps been modified by a limitation of the increase of the damages to the extent of the injury sustained by the repetition.^(d) But it would seem to have been wholly superseded by that act, which permits the defendant, in his answer, to allege both the truth of the matter charged as defamatory, and any mitigating circumstances, and whether he prove the justification or not, to give in evidence the mitigating circumstances.^(e) And it is now held by the New York

(*) *Cavanaugh v. Austin*, 42 Vt. 576.

(b) *Ward v. Dick*, 47 Conn. 300; *Cummerford v. McAvoy*, 15 Ill. 311; *Sloan v. Petrie*, 15 Ill. 425; *Thomas v. Dunaway*, 30 Ill. 373; *Corbley v. Wilson*, 71 Ill. 209; *Murphy v. Stout*, 1 Ind. 372; *Pallet v. Sargent*, 36 N. H. 496; *Rayner v. Kinney*, 14 Oh. St. 283, overruling the dictum *contra* in *Dewit v. Greenfield*, 5 Oh. 225.

(c) *Fero v. Ruscoe*, 4 N. Y. 162.

(d) *Fulkerson v. George*, 3 Abb. Pr. 75.

(e) N. Y. Co. Civ. Proc., § 535; *Bush v. Prosser*, 11 N. Y. 347.

Court of Appeals, that where the defendant, in an action of libel or slander, pleads under this section, facts both in justification and mitigation, the allegations in justification, though unproved, are no longer evidence of malice to be considered by the jury, or taken as enhancing the plaintiff's damages.^(*) In these jurisdictions, however, the *malicious* filing of a plea in justification may be considered in aggravation of damages.^(b)

§ 448. *Mitigation—Disproof of actual malice.*—Damages may be mitigated by disproof of actual malice. So in an action for a printed libel, it is proper to admit evidence of what was said by the defendant in directing the printing, in order to disprove actual malice in the publication, and to influence the question of damages. The terms and conditions on which the defendant requested the printing and publication to be done, and on which the witness agreed to do it, are admissible in evidence as pertinent and material in respect to the *motives* of the defendant in procuring the publication complained of.^(c) In Illinois, where the plaintiff was a candidate for an office, and, in the excitement of a campaign and without the defendant's knowledge, a libellous article was published in a paper of which the defendant was editor, it was held that these facts could be proved to show that there was no actual malice, and thus reduce exemplary damages, but could not be shown in mitigation of compensatory damages.^(d) So where it appears that the defendant was

(*) *Klinck v. Colby*, 46 N. Y. 427; *Decker v. Gaylord*, 35 Hun 584. The remarks, therefore, of Mr. Justice E. D. Smith, to the contrary, in delivering the opinion of the Supreme Court of New York, in *Bennett v. Matthews*, 64 Barb. 410, were at variance with the settled law.

(b) *Beasley v. Meigs*, 16 Ill. 139; *Freeman v. Tinsley*, 50 Ill. 497; *Aird v. Fireman's Journal Co.*, 10 Daly 254.

(c) *Taylor v. Church*, 8 N. Y. 452.

(d) *Rearick v. Wilcox*, 81 Ill. 77.

drunk when he uttered the words, this may go in mitigation of damages as tending to rebut malice.^(*) But where it is proved that he repeated the charge both when drunk and sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.¹ The insanity of the defendant may be shown.^(b) It has apparently been allowed as a complete defense,^(c) but that is not to be approved in a civil suit.

Matters which induced a belief of the truth of the charge in the defendant may be shown to disprove malice. Thus where the defendant's newspaper published a libel on the plaintiff, the receipt by the defendant of forged letters containing statements upon which the charge was founded may be shown in mitigation.^(d) Where the defendant accused the plaintiff of unchastity, evidence is admissible of an increase in the plaintiff's size resembling pregnancy, which in fact was from another cause.^(e)

In actions of slander and libel, it has been much discussed how far the fact of the slander or libel complained of being a mere repetition or republication can be set up, either in justification or mitigation.² It can be set up in New Hampshire in mitigation.^(f) It was said in *Hinkle v. Davenport* ^(g) that a defendant could show in mitigation that he had stated the slander as a report he had heard.

¹ *Howell v. Howell*, 10 Ired. 84.

² *Bennett v. Bennett*, 6 C. & P. 588, and cases cited.

(*) *Gates v. Meredith*, 7 Ind. 440.

(b) *Yeates v. Reed*, 4 Blackf. 463; *Brown v. Brooks*, 3 Ind. 518.

(c) *Bryant v. Jackson*, 6 Humph. 199.

(d) *Storey v. Early*, 86 Ill. 461.

(e) *Doe v. Roe*, 32 Hun 628.

(f) *Wier v. Allen*, 51 N. H. 177.

(g) 38 Ia. 355.

§ 449. **Provocation.**—In an action of slander or libel, it is competent for the defendant to show, in mitigation of damages, the manner of language held towards him by the plaintiff, or other provocation, immediately prior to the time of the libel for which he is sued.^(a) So the fact that the libel was provoked by a recent libel of the plaintiff on the defendant may be shown in mitigation.^(b) It was held in North Carolina that mental distress of the defendant at the time he uttered the slander, caused by his belief in the truth of it, was admissible in mitigation.^(c) But the defendant cannot prove in mitigation of damages, irritating language addressed to him by the father of the plaintiff immediately previous to the uttering of the slanderous words to another person.¹

§ 450. **Disproof of damage.**—Another class of facts are received in mitigation, because they show that the damage caused to the plaintiff by the defamation was less than would otherwise be the case. Since the principal element of damage is injury to the plaintiff's character, it is pertinent to show that this character was not at all or very little injured in the minds of the hearers. This may be done in one of two ways: by showing that the words were not believed, or by showing that the plaintiff's character was so bad as not to be injured. The former method is not encouraged by the courts, because in adopting it the defendant is obliged to defame him-

¹ *Underhill v. Taylor*, 2 Barb. 348.

(a) *Freeman v. Tinsley*, 50 Ill. 497; *Brown v. Brooks*, 3 Ind. 518; *Mousler v. Harding*, 33 Ind. 176; *Botelar v. Bell*, 1 Md. 173; *Newman v. Stein*, 75 Mich. 402; *Warner v. Lockerby*, 31 Minn. 421; *Powers v. Presgroves*, 38 Miss. 227; *Massuere v. Dickens*, 70 Wis. 83.

(b) *Watis v. Fraser*, 7 C. & P. 369; *Pugh v. McCarty*, 40 Ga. 444; *Maynard v. Beardsley*, 7 Wend. 560.

(c) *McDougald v. Coward*, 95 N. C. 368.

self. Thus in Massachusetts it was held that the defendant could not show that he was in the habit of talking too much about persons and things, so that what he said was not regarded in the community as worthy of notice.^(a) Yet the evidence would bear directly on the degree of the plaintiff's injury. The defendant may prove, in mitigation of damages, a declaration of the plaintiff that he was not injured by the words complained of. But evidence that the witnesses who heard the words uttered did not believe them, is not admissible.^(b) The latter method, on the other hand, is a commonly attempted and much controverted method of mitigating damages, and the authorities are in great confusion.

§ 451. *Bad character of the plaintiff.*—The general bad character of the plaintiff at the time of the alleged slander is admissible in mitigation of damages, not merely with a view to disprove malice, but upon the broader ground that a person of already disparaged reputation is not entitled to the same measure of damages as one with an unblemished fame. The evidence is admitted to show the value of what is alleged to be injured, and is, therefore, not to be restricted to the particular traits of character involved in the slanderous words.^(c) So a charge

(a) *Howe v. Perry*, 15 Pick. 506; *Hastings v. Stetson*, 130 Mass. 76.

(b) *Richardson v. Barker*, 7 Ind. 567.

(c) *Whitney v. Janesville Gazette*, 5 Biss. 330; *Wright v. Schroeder*, 2 Curt. 548; *Waters v. Jones*, 3 Port. 442; *Pope v. Welsh*, 18 Ala. 631; *Fuller v. Dean*, 31 Ala. 654; *Brunson v. Lynde*, 1 Root 354; *Seymour v. Merrills*, 1 Root 459; *Sheahan v. Collins*, 20 Ill. 325; *Adams v. Smith*, 58 Ill. 417; *Burke v. Miller*, 6 Blackf. 155; *Armstrong v. Pierson*, 8 Ia. 29; *Eastland v. Caldwell*, 2 Bibb. 21; *Shilling v. Carson*, 27 Md. 175; *Bodwell v. Swan*, 3 Pick. 376; *Stone v. Varney*, 7 Met. 86; *Leonard v. Allen*, 11 Cush. 241; *Clark v. Brown*, 116 Mass. 504; *Peterson v. Morgan*, 116 Mass. 350; *Mahoney v. Belford*, 132 Mass. 393; *Anthony v. Stephens*, 1 Mo. 254; *Lamos v. Snell*, 6 N. H. 413; *Sayre v. Sayre*, 25 N. J. L. 235; *Paddock v. Salisbury*, 2 Cow. 811; *Hamer v. McFarlin*, 4 Denio 509; *Vick v. Whitfield*, 2 Hayw. 222; *De-*

to the jury that if the plaintiff by her own dissolute conduct had so destroyed her character as to receive no injury from the words they should give nominal damages is good.^(*) But bad character of the plaintiff after he is defamed by the defendant will of course not be admissible in mitigation.^(b)

So also the bad character of the plaintiff in the particular trait involved in the defamation may be shown.^(c) There is a conflict of opinion upon the question whether a general rumor of the truth of the fact charged by the defendant is admissible in mitigation of damages. The weight of authority favors the admission of the evidence,^(d) but some of our courts exclude it.^(e) The objection to its admission is that if the truth is not pleaded in justification the plaintiff is not prepared to

wit *v. Greenfield*, 5 Oh. 225; *Henry v. Norwood*, 4 Watts 347; *Steinman v. McWilliams*, 6 Pa. St. 170; *Sawyer v. Eifert*, 2 N. & McC. 511; *B. v. I.*, 22 Wis. 372; *Maxwell v. Kennedy*, 50 Wis. 645; *Campbell v. Campbell*, 54 Wis. 90. *Contra*, that the plaintiff's bad character can be shown only as regards the trait involved, *Lambert v. Pharis*, 3 Head 622; *Dillard v. Collins*, 25 Gratt. 343; *Williston v. Smith*, 3 Kerr 443.

(*) *Flint v. Clark*, 13 Conn. 361.

(b) *Scott v. McKinnish*, 15 Ala. 662; *Douglass v. Tousey*, 2 Wend. 352.

(c) *Anonymous v. Moor*, 1 M. & S. 284; *Turner v. Foxall*, 2 D. C. (2 Cr. C. C.) 324; *McCabe v. Platter*, 6 Blackf. 405; *Fletcher v. Burroughs*, 10 Ia. 557; *Hanners v. McClelland*, 74 Ia. 318; *Larned v. Buffinton*, 3 Mass. 546; *Warner v. Lockerby*, 31 Minn. 421; *Sowers v. Sowers*, 37 N. C. 303; *Duval v. Davey*, 32 Oh. St. 604; *Moyer v. Moyer*, 49 Pa. 210 (overruling *Steinman v. McWilliams*, 6 Pa. St. 170, on this point); *Drown v. Allen*, 91 Pa. 393; *Bowen v. Hall*, 20 Vt. 232; *Bridgman v. Hopkins*, 34 Vt. 532; *M'Nutt v. Young*, 8 Leigh 542; *B. v. I.*, 22 Wis. 372; *Campbell v. Campbell*, 54 Wis. 90. *Contra*, *Root v. King*, 7 Cow. 613.

(d) *Broughton v. McGrew*, 39 Fed. Rep. 672; *Fuller v. Dean*, 31 Ala. 654; *Case v. Marks*, 20 Conn. 248 (*semble*); *Morris v. Barker*, 4 Harr. 520; *Brown v. Brooks*, 3 Ind. 518; *Barr v. Hack*, 46 Ia. 308; *McCurry v. McCurry*, 82 N. C. 296.

(e) *Strader v. Snyder*, 67 Ill. 404; *Peterson v. Morgan*, 116 Mass. 350; *Mahoney v. Belford*, 132 Mass. 393; *Anthony v. Stephens*, 1 Mo. 254; *Dame v. Kenney*, 25 N. H. 318 (but *contra*, *Wetherbee v. Marsh*, 20 N. H. 561.; *Inman v. Foster*, 8 Wend. 602.

disprove the fact. Yet, on the other hand, if a general rumor already prevailed of the same tenor as the defendant's words, the latter would clearly not damage the plaintiff to so great a degree as if no such rumor prevailed. So far as any principle of the law of damages is concerned, therefore, the evidence should be received. If rejected, it should be upon the ground that the line of defense is not open under the pleadings. But no evidence can be received of particular acts not charged in the defendant's words, nor of rumors of them, even though the charge was of a general bad character which the particular acts would tend to prove.^(*) It has been held in New York that evidence of the plaintiff's character as a common libeller may be shown in mitigation.^(b)

In a case in the United States Circuit Court, it was said that the high and established character of the plaintiff could be shown in mitigation, since there was less chance of such a character being injured.^(c) This doctrine, if established, would lead to the curious result that only a person of no character at all, either good or bad, could resist the introduction of evidence by the defendant as to his character. Yet, on the whole, the doctrine seems to be sound; and if so, either party can introduce evidence of the good or bad character of both parties,

(*) *Bradley v. Gibson*, 9 Ala. 406; *Seymour v. Merrills*, 1 Root 459; *Burke v. Miller*, 6 Blackf. 155; *Hallowell v. Guntle*, 82 Ind. 554; *Hanners v. McClelland*, 74 Ia. 318; *McLaughlin v. Cowley*, 131 Mass. 70; *Lamos v. Snell*, 6 N. H. 413; *Vick v. Whitfield*, 2 Hayw. 222; *Dewit v. Greenfield*, 5 Oh. 225; *Duval v. Davey*, 32 Oh. St. 604; *Sawyer v. Eifert*, 2 N. & McC. 511; *Bowen v. Hall*, 20 Vt. 232. But in Ohio, in an action for words impugning the chastity of a female, it was held that the defendant may prove, under the general issue and in mitigation of damages, that she and an unmarried man had formerly lived alone together in the same house; that fact having been known to the defendant at the time of speaking the words. *Reynolds v. Tucker*, 6 Oh. St. 516.

(b) *Maynard v. Beardsley*, 7 Wend. 560.

(c) *Broughton v. McGrew*, 39 Fed. Rep. 672.

that the jury, having all the facts, may the better estimate the amount of damage.

§ 452. *Truth*.—Originally in slander under the general issue, the defendant might avail himself of any defense. But it was decided in England at an early day,¹ that if the defendant intended to justify, he should plead his justification, in order that the plaintiff might know what defense he was to meet. In New York it was held that if the defendant justified he admitted the malice, and could not resort to any defense based upon the absence of malice. So, mitigating circumstances having a tendency to prove the truth of the charge, could not be given in evidence under the general issue in diminution of damages; but any circumstances which disprove malice, but do not tend to prove the truth of the charge, were admissible.² This rule, that facts tending to prove the truth of the charge cannot be shown in mitigation of damages, has been abrogated in New York by the Code of Procedure.^(a) A similar relaxation of the rule obtains also in some other jurisdictions.^(b) But in some States, the rule that nothing which tends to prove the truth of the charge can be received in mitigation, is still adhered to.^(c) In Indiana, although the same evidence is required to establish the plea of justification of slander, consisting in charging the plaintiff with a criminal offense, as would be necessary to

¹ *Underwood v. Parks*, Strange, 1200.

² *Gilman v. Lowell*, 8 Wend. 573.

(a) Co. Civ. Proc. § 535. Since that act the defendant may give in evidence any circumstances tending to disprove malice although they also tend to prove the charge. *Bush v. Prosser*, 11 N. Y. 347 (reversing S. C. 13 Barb. 221), and *Bisbey v. Shaw*, 12 N. Y. 67.

(b) *Cooke v. O'Brien*, 2 D. C. (2 Cr. C. C.) 17; *Kansone v. Christian*, 49 Ga. 491 (but see *Richardson v. Roberts*, 23 Ga. 215); *Wagner v. Holbrunner*, 7 Gill 296; *West v. Walker*, 2 Swan 32.

(c) *Abshire v. Cline*, 3 Ind. 115; *Updegrove v. Zimmerman*, 13 Pa. 619; *Stees v. Kemble*, 27 Pa. 112; *Smith v. Smith*, 39 Pa. 441.

convict him of the offense in a criminal prosecution,^(a) evidence insufficient to establish the plea may be considered in mitigation of damages.^(b)

§ 453. *Retraction.*—In an action of slander, a *recantation* of the slanderous charge may be admissible in evidence, in mitigation of damages;^(c) but such retraction must be in public, or in a mode to qualify the slander, in order to be of any avail.^(d) And it must be so seasonable as really to lessen the damage. In *Evening News Association v. Tryon* ^(e) the court said: "After the libelous article has run its course, a retraction could in no sense mitigate the injury sustained. Indeed, at such a late day, a retraction would but revive the scandal and might be an aggravation rather than otherwise."

§ 454. *Rule in Louisiana.*—*It has been distinctly declared in Louisiana that no proof of damage is necessary to entitle the plaintiff to recover in actions of libel, and that the pecuniary damage is never the sole rule of assessment.¹ **

§ 455. *Slander of title.*—*It is also necessary to notice the action of slander of title of real estate. A false statement made maliciously with reference to the title to real estate, is a good cause of action; but the malice cannot be inferred from the falsehood: in order to recover substantial damages, they must be proved to have resulted from the false statement.¹ **

¹ *Daly v. Van Benthuyssen*, 3 La. 371; *Brook v. Rawl*, 4 Exch. 521; *Pitt v. Donovan*, 1 M. & S. 639.

² *Malachy v. Soper*, 3 Bing. N. C.

(a) *Landis v. Shanklin*, 1 Ind. 92; *Shoulty v. Miller*, 1 Ind. 544; *Swails v. Butcher*, 2 Ind. 84.

(b) *Landis v. Shanklin*, 1 Ind. 92; *Shoulty v. Miller*, 1 Ind. 544.

(c) *Storey v. Wallace*, 60 Ill. 51. †

(d) *Kent v. Bonzey*, 38 Me. 435.

(e) 42 Mich. 549, 550.

To maintain an action for slander of title to lands, the words spoken must not only be false, but they must be uttered maliciously, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged and proved. And where the plaintiff, before the speaking of the words, had entered into a written contract with a third person, for the sale to him of the lands in relation to which the words were spoken; and the purchaser afterwards, in consequence of these words, having become dissatisfied with his purchase, the contract was, at his request, cancelled by the plaintiff, and part of the purchase-money which had been paid returned to him (the loss of a sale to that person being the only special damage alleged); it was held that the action could not be maintained; that the damages (if any) sustained by the plaintiff were the consequence of his own voluntary act, and not of the words spoken by the defendant. (*)

MALICIOUS PROSECUTION, FALSE IMPRISONMENT, ETC.

§ 456. **Malicious prosecution—Elements of damage.**—We next consider a class of actions where the defendant wrongfully caused the arrest and imprisonment of the plaintiff, or otherwise maliciously set in motion the machinery of the law, to his damage. Where the defendant himself was concerned in the arrest, an action for false imprisonment lies; otherwise the action must be one of those actions upon the case, the gist of which is malice, such as malicious prosecution, malicious attachment, etc.; and first of malicious prosecution.

Three sorts of damage will support an action for a malicious indictment: first, to a man's fame; second, to his person, as where he is put in danger of losing his life,

(*) *Kendall v. Stone*, 5 N. Y. 14.

or limb, or liberty; third, to his property, as where he is forced to expend money to acquit himself of the crime charged.^(*) It has been held in New York that the jury in this action cannot, upon the question of malice and in determining the amount of damages, take into consideration facts which establish against some of the defendants a case of false imprisonment, as such facts constitute a distinct cause of action, for which those defendants may be rendered liable in another suit.¹ It is intimated by Cockburn, C. J., that in estimating damages in an action for false imprisonment and malicious prosecution, the jury must consider not only the sufferings and loss of the plaintiff, but also the necessity which exists for the occasional prosecution of innocent persons in order to prevent the escape of criminals from justice.^(b) If the observation of this very eminent judge be sound, it introduces into the rules of damages a principle neither based on the notion of compensation nor on those of example and punishment, and one which we think has never been distinctly recognized.

§ 457. *Physical injury*.—Compensation may be recovered for injury to the person by being imprisoned upon the defendant's charge,^(c) such as injury to the health.^(d) So compensation may be recovered for being rendered insane by the imprisonment;^(e) and for physical suffering caused by cold, want of a bed, and deprivation of food.^(f)

¹ *Carpenter v. Shelden*, 5 Sand. 77.

(*) *Savile v. Roberts*, 1 Ld. Raym. 374.

(b) *Tulley v. Corrie*, 16 L. T. N. R. S. 796.

(c) *Lavender v. Hudgens*, 32 Ark. 763.

(d) *Lytton v. Baird*, 95 Ind. 349; *Fagnan v. Knox*, 40 N. Y. Super. Ct. 41; *Plath v. Braunsdorff*, 40 Wis. 107.

(e) *Plath v. Braunsdorff*, 40 Wis. 107.

(f) *Abrahams v. Cooper*, 81 Pa. 232.

§ 458. *Injury to feelings, reputation, and liberty.*—Compensation may be recovered for the wrong and indignity,^(a) and for injury to the reputation.^(b) In Michigan it has been said that the plaintiff could recover compensation for the loss of society of his family, injury to his fame, personal mortification and the smart and injury of the malicious arts and acts of oppression of the defendant.^(c) But where the plaintiff had been arrested for theft, he was not allowed to show that his name was entered in the detective's book, and publicity thus given to it, without showing that this was done in accordance with law, or that the defendant knew it would be done.^(d) Compensation may also be recovered for the deprivation of liberty^(e) and for the risk of conviction.^(f)

§ 459. *Loss of property—Expenses.*—In *Sonneborn v. Stewart*,^(g) it was said that the items of damages in an action for maliciously instituting bankruptcy proceedings were: first, the actual damage to the defendant's goods; second, damages for the breaking-up of his business and destruction of his credit;^(h) third, his expenses for lawyer's fees in setting aside the proceedings. The attorney's fees in the previous action can generally be recovered.⁽ⁱ⁾ And it has been held that the plaintiff can recover the

(a) *Lavender v. Hudgens*, 32 Ark. 763; *Lytton v. Baird*, 95 Ind. 349; *Tompson v. Mussey*, 3 Me. 305; *McWilliams v. Hoban*, 42 Md. 56.

(b) *Blunk v. Atchison, T. & S. F. R.R. Co.*, 38 Fed. Rep. 311; *Lavender v. Hudgens*, 32 Ark. 763; *Lytton v. Baird*, 95 Ind. 349; *Sheldon v. Carpenter*, 4 N. Y. 578; *Fagnan v. Knox*, 40 N. Y. Super. Ct. 41.

(c) *Hamilton v. Smith*, 39 Mich. 222.

(d) *Garvey v. Wayson*, 42 Md. 178.

(e) *Hamilton v. Smith*, 39 Mich. 222; *Sheldon v. Carpenter*, 4 N. Y. 578; *Abrahams v. Cooper*, 81 Pa. 232.

(f) *Lavender v. Hudgens*, 32 Ark. 763; *Abrahams v. Cooper*, 81 Pa. 232.

(g) 2 Woods 599.

(h) *Acc. Lawrence v. Hagerman*, 56 Ill. 68; *Magmer v. Renk*, 65 Wis. 364.

(i) *Krug v. Ward*, 77 Ill. 603; *Walker v. Pittman*, 108 Ind. 341.

damages sustained by him in defending the original suit, in excess of his taxable costs.^(*) In fact, the court usually says merely that the reasonable expense of defending the criminal action is recoverable.^(b) The loss of the plaintiff's time is also an element of recovery,^(c) but not profits as such, although their average amount may be considered by the jury as a fact tending to show the magnitude of the injury.^(d) When an action is allowed to lie for the malicious prosecution of a civil suit against the plaintiff, compensation may be recovered for these material losses,^(e) though generally that is all that can be recovered, since there was no imprisonment of the plaintiff.

§ 460. **Mitigation.**—Evidence of the plaintiff's bad character is admissible in mitigation of damages.^(f) In Georgia the advice of counsel is of itself no defense to an action of malicious prosecution; but, if given *bona fide*, it is a circumstance to be considered on the question of probable cause and in mitigation of damages.^(g) But in Illinois it seems that advice of counsel is a defense, and it has been held that the advice of a detective may be shown in mitigation.^(h)

§ 461. **False imprisonment—Loss of time.**—The action for false imprisonment lies, as has been seen, where the

(*) *Closson v. Staples*, 42 Vt. 209.

(b) *Blunk v. Atchison, T. & S. F. R.R. Co.*, 38 Fed. Rep. 311; *Lavender v. Hudgens*, 32 Ark. 763; *Hamilton v. Smith*, 39 Mich. 222; *Sheldon v. Carpenter*, 4 N. Y. 578; *Fagnan v. Knox*, 40 N. Y. Super. Ct. 41.

(c) *Blunk v. Atchison, T. & S. F. R.R. Co.*, 38 Fed. Rep. 311; *Hamilton v. Smith*, 39 Mich. 222.

(d) *Sturgis v. Frost*, 56 Ga. 188.

(e) *Woods v. Finnell*, 13 Bush 628; *Magmer v. Renk*, 65 Wis. 364.

(f) *Rosenkrans v. Barker*, 115 Ill. 331; *Fitagibbon v. Brown*, 43 Me. 169; *Bacon v. Towne*, 4 Cush. 217.

(g) *Fox v. Davis*, 55 Ga. 298.

(h) *Hirsch v. Feeney*, 83 Ill. 548.

defendant himself made the arrest. It is not, however, necessary to the maintenance of this action that there has been a real or pretended arrest; it also lies where the plaintiff was restrained of his liberty, without any pretence that it was done in pursuance of legal authority. The plaintiff in this action may recover for his loss of time and the interruption to his business.^(a)

§ 462. **Bodily and mental suffering.**—The plaintiff may recover compensation for the bodily and mental suffering caused by the imprisonment,^(b) and for the indignity.^(c) Evidence may be given of the circumstances of plaintiff's family and of the filthy condition of the jail, as bearing on the mental suffering resulting from the imprisonment.^(d) So compensation may be recovered for having been manacled and compelled to labor in common with other prisoners.^(e)

§ 463. **Expense of release.**—The expense of obtaining release from imprisonment may be recovered.^(f) So costs actually paid in the former action and properly alleged are recoverable.^(g) And in Wisconsin it is held that under a proper averment, counsel fees in procuring the plaintiff's discharge may be recovered if the plaintiff was liable for them, although they had not been actually paid.^(h) "Where a party," said Erle, C. J., in the case of *Bradlaugh v. Edwards*,^(k) "has been illegally im-

(a) *Jay v. Almy*, 1 W. & M. 262; *Morgan v. Curley*, 142 Mass. 107; *Hays v. Creary*, 60 Tex. 445; *Parsons v. Harper*, 16 Gratt. 64.

(b) *Ross v. Leggett*, 61 Mich. 445; *Hays v. Creary*, 60 Tex. 445; *Parsons v. Harper*, 16 Gratt. 64.

(c) *Morgan v. Curley*, 142 Mass. 107.

(d) *Fenelon v. Butts*, 53 Wis. 344.

(e) *McCall v. McDowell*, Deady 233.

(f) *Parsons v. Harper*, 16 Gratt. 64.

(g) *Pritchett v. Boevey*, 1 Cr. & M. 775.

(h) *Bonesteel v. Bonesteel*, 30 Wis. 511.

(k) 11 C. B. N. S. 377, 384.

prisoned, and has been put to expense in procuring his discharge, he may very well urge that fact before the jury as an aggravation, but he has no *right* to demand to be reimbursed *ex debito justitiæ*." And the court refused to grant a new trial, which was demanded on the ground that the plaintiff had incurred an expense of £7 14s. in procuring his discharge from custody at a police station where he had been detained on a charge of assault which proved unfounded. It has been held, however, in New York, that in an action for false imprisonment, the plaintiff may recover damages for the time spent, and expenses incurred, in procuring his discharge upon habeas corpus, where the application for the discharge was not palpably unnecessary. It does not appear, from the opinion, that these damages were specially alleged.^(*) So where the plaintiff, who had been committed to jail for manslaughter, by a coroner's warrant, was afterwards admitted to bail, and subsequently got the inquisition under which he had been committed quashed, it was held, in an action against the coroner for false imprisonment, in which was alleged as special damage that he had been obliged to pay money in procuring his discharge from custody, that he was entitled to recover the costs of quashing the inquisition.^(b)

§ 464. **Consequential damages.**—In an action of false imprisonment, the defendant had given the plaintiff into custody on a charge of felony. The magistrate heard the charge, and remanded the prisoner. It subsequently appearing that the charge had been made under a mistake,

(*) *Blythe v. Tompkins*, 2 Abb. Pr. 468. But in another case in New York it was held that fees paid to an attorney for getting rid of an illegal arrest were special damages, and must be laid in the declaration. *Strang v. Whitehead*, 12 Wend. 64.

(b) *Foxall v. Barnett*, 2 E. & B. 928.

the plaintiff was released. The declaration charged the first arrest and the remand as distinct acts of trespass, and damages were given for both, although the latter was the act of the magistrate, on the ground that the wrongdoer was responsible for it as the consequence of his wrongful act; but it was held erroneous, and a new trial was granted, on the ground that the defendant was not responsible for the act of the magistrate.¹ (*) This decision must be supported, if at all, upon the particular facts of the case. The natural consequences of the arrest are subjects of compensation, and the remand may surely be a natural result of the arrest. It was held in Illinois that the defendant, who secured the plaintiff's arrest, must compensate him for being taken into another county and confined in a filthy jail.^(b) Where a seaman was wrongfully imprisoned in a foreign port by his master, and his vessel sailed without him, he was allowed compensation for the loss of his effects and the cost of his passage home.^(c)

§ 465. **Aggravation.**—An action of trespass being brought for false imprisonment, and a plea that the defendant had committed a felony being put in, it was held not to be a misdirection, that the judge told the jury that the putting of such a plea on the record was a persisting in the charge contained in it, and was to be taken into account by them in estimating the damages.¹

§ 466. **Mitigation.**—It has been held in Pennsylvania, that in trespass against a constable for arresting and imprisoning the plaintiff on suspicion of a felony, the bad character of the plaintiff cannot be given in evidence in

¹ *Lock v. Ashton*, 12 Q. B. 871.

² *Warwick v. Foulkes*, 12 M. & W. 507.

(*) *Acc. Lyden v. McGee*, 16 Ont. 105.

(b) *Kindred v. Stitt*, 51 Ill. 401.

(c) *Jay v. Almy*, 1 W. & M. 262.

mitigation of damages.¹ The fact that the defendant was advised to make the arrest by an ignorant and inexperienced attorney may be considered in mitigation.^(*) And generally the information under which the defendant acted may be shown as bearing on the question of intent.^(b) Evidence of good faith and want of malice is not proper where exemplary damages are not claimed.^(c) In an action to recover damages of the defendant for having illegally procured the plaintiff's arrest and imprisonment for discouraging enlistments, which was done by a Federal officer on the defendant's affidavit, the defendant was allowed to prove in mitigation that the plaintiff had in fact discouraged enlistments.^(d) It was held in *Prentiss v. Shaw*,^(e) in an action for an unlawful arrest, that the declarations of a plaintiff prior to the arrest and tending to provoke it, could not be admitted to reduce his compensation for the actual injury, but were admissible to mitigate the damages for the indignity and the punitive damages. During the Civil War the plaintiff, having publicly and indecently exulted at the assassination of the President of the United States, was arrested pursuant to a general order of the defendant, who commanded a military department. The order was illegal, but was issued without malice, and was intended as a means of preserving the public peace. The plaintiff was held not entitled to exemplary damages. On the other hand, the provocation of his language was allowed in mitigation.^(f)

¹ *Russell v. Shuster*, 8 W. & S. 308.

(*) *Mortimer v. Thomas*, 23 La. Ann. 165.

(b) *Livingston v. Burroughs*, 33 Mich. 511.

(c) *Comer v. Knowles*, 17 Kas. 436; *Fenelon v. Butts*, 53 Wis. 344.

(d) *Roth v. Smith*, 54 Ill. 431.

(e) 56 Me. 427.

(f) *McCall v. McDowell*, Deady 233.

§ 467. **Malicious attachment.**—An action lies for maliciously attaching the plaintiff's property. In Alabama it has been decided that in an action for wrongfully and vexatiously suing out an attachment auxiliary to the main suit to enable the plaintiff to obtain a lien on property for the satisfaction of whatever judgment he might recover, the costs incurred in defending the original suit constitute no part of the plaintiff's damages;¹ though the counsel fees in the suit may be proven and considered by the jury.² Nor can expenses incurred in attending or damages for loss of time incurred in defending the principal suit be recovered.^(*) The measure of damages is said to be the actual loss from being deprived of use of property, injury to it, and expenses incurred in defending attachment proceedings.^(b) Where wheat wrongfully attached advanced considerably in value pending the proceeding, but at the time of its redelivery to the defendant in the attachment had declined to about the price it bore when the process was levied, it was held that he could not recover the difference between its highest market value pending the attachment and its value at the time of the redelivery, without proof that he could or would have sold it at the advanced rate.^(c) Where, however, bonds and notes belonging to a bank were wrongfully attached, and declined in value pending the attachment, the defendants were held liable for the actual loss resulting from the sale at a price lower than would have been realized but for the attachment.^(d) So, in Mississippi, the depreciation in the value of wheat pending an attachment was held to be the measure of

¹ *White v. Wyley*, 17 Ala. 167.

² *Marshall v. Betner*, 17 Ala. 832.

(*) *Craddock v. Goodwin*, 54 Tex. 578.

(b) *Boatwright v. Stewart*, 37 Ark. 614.

(c) *Meshke v. Van Doren*, 16 Wis. 319.

(d) *Horn v. Bayard*, 11 Rob. La. 259.

damages for the wrongful suing out of the attachment.^(*) In this action evidence of the plaintiff's profits alleged to be lost by injury to his credit has been admitted, not as a measure of damages, but as an ingredient in the cause, or to guide the discretion of the jury.¹ Damages for destruction of business may be recovered.^(b) A shopkeeper has been allowed, where his goods had been wrongfully attached, to recover for loss of business during the time it was suspended, and evidence was admitted as to the value of the use of such goods where the amount received per day was stated.^(c) Where, in Louisiana, an attachment against a vessel was released on the execution of a mortgage on her by her master, which mortgage was void by the laws of the State, and pending the suit in which the attachment was issued the vessel passed into the hands of *bona fide* purchasers, but was not registered in the custom-house, and there was no record evidence of the change of ownership, and after final judgment decreeing her to be liable she was again seized by her attaching creditors, but released in four days without being delayed in the prosecution of her next voyage, it was held in an action by the owners for the wrongful seizure that they were entitled to nominal damages only. The court said that they had no cause to complain that they were called to make proof of ownership in a thing apparently bound for the claim of the seizing creditor.^(d)

¹ *Donnell v. Jones*, 17 Ala. 689.

(*) *Fleming v. Bailey*, 44 Miss. 132.

(b) *Haynes v. Knowles*, 36 Mich. 407. It was said in *Reidhar v. Berger*, 8 B. Monr. 160, that these could only be recovered in an action on the case, and not in an action on the attachment bond. See, further, *Wallace v. Finberg*, 46 Tex. 35.

(c) *Alexander v. Jacoby*, 23 Oh. St. 358.

(d) *Hunter v. Bennett*, 15 La. Ann. 715.

VOL. II.—4

TORTS INVOLVING LOSS OF SERVICE.

§ 468. **Injury to child or servant.**—In trespass for assault on the child or servant of plaintiff, the ground of action being the loss of service, the measure of damages is the actual loss which the plaintiff has sustained, and if illness follows, the expenses attending such illness.^(a) In the ordinary case of loss of service through a physical injury to the child or other servant the injuries to the master and to the servant are distinct, and recovery by one of them cannot affect the amount recoverable by the other.^(b)

In such an action by a parent the rule is now well established to be compensation for the loss of the minor's future services, and the expenses sustained by the injury, such as those for surgical and medical attendance, and the increased expense of maintaining the child during minority.^(c) A parent can recover for the expenses incurred, although the child was too young to render any service.^(d) The parent may recover for the loss of the child's services to the age of twenty-one.^(e) In an action by a husband for the loss of his wife's services through the defendant's fault, he may recover the value of her services which he has lost.^(f) In such an action it was held proper to admit evidence of what the plaintiff had

^(a) So in other actions for injuries to a child. *Pennsylvania R.R. Co. v. Kelly*, 31 Pa. 372; *Pennsylvania R.R. Co. v. Zebe*, 33 Pa. 318.

^(b) *Evansich v. Gulf, C. & S. F. Ry. Co.*, 57 Tex. 123; *Bradley v. Andrews*, 51 Vt. 525.

^(c) *Sawyer v. Sauer*, 10 Kas. 519; *Lang v. New York, L. E. & W. R.R. Co.*, 51 Hun 603; *Gilligan v. New York & H. R.R. Co.*, 1 E. D. Smith 453; *Oakland Ry. Co. v. Fielding*, 48 Pa. 320; *Houston & G. N. R.R. Co. v. Miller*, 49 Tex. 322; *Texas & P. Ry. Co. v. Morin*, 66 Tex. 133.

^(d) *Sykes v. Lawlor*, 49 Cal. 236.

^(e) *Traver v. Eighth Ave. R.R. Co.*, 3 Keyes 497.

^(f) *Citizens S. Ry. Co. v. Twiname*, 121 Ind. 375.

paid a third person to do the work his wife usually performed.^(a) So, also, it has been held that he can recover something for his own services in attending on her.^(b) Evidence of the pecuniary condition of the plaintiff is inadmissible.^(c)

§ 469. **Enticement of servant.**—In the action for enticing a servant from his employment, it was said that the general rule of damages is the value of the servant's time during the period he was in the defendant's employment; but that, in cases of aggravation, the jury may give the whole value of the servant;¹ this, however, referred rather to slaves than to servants. In a case of this kind in Illinois, for enticing a registered servant, it was held that the plaintiff was entitled to recover the value of the services lost up to the time of the commencement of the suit, the reasonable expenses necessarily incurred in getting the servant back again, and damages for the loss of time, trouble, and injury sustained until the commencement of the suit; and that, if the plaintiff lost the entire service in consequence of the defendant's act, then he was entitled to the value of the term of service.² So it has been held that the reasonable expenses of searching for an abducted child may be recovered by the parent.^(d)

§ 470. **Consequential damages.**—In an action on the case for enticing the plaintiff's servants, who were not hired by the plaintiff for a limited or constant period, but worked by the piece, by inviting them to dinner, and inducing

¹ *Dubois v. Allen*, Anthon's N. P. 128. ² *Hays v. Borders*, 6 Ill. 46.

(a) *Lindsey v. Danville*, 46 Vt. 144.

(b) *Smith v. St. Joseph*, 55 Mo. 456; and for injury to a child, *Connell v. Putnam*, 58 N. H. 534.

(c) *Rooney v. Milwaukee C. Co.*, 65 Wis. 397.

(d) *Rice v. Nickerson*, 9 All. 478.

them to sign an agreement not to work for him ; it being proved that the plaintiff, a piano-forte maker, realized about £800 per annum by the sale of his instruments, the jury found a verdict for £1,600. The plaintiff was nearly, if not absolutely, ruined. On a motion for a new trial, it was insisted that, as the men worked by the piece, each of them was justified in leaving the plaintiff when he had completed the work in hand ; and that, in point of fact, the plaintiff could only be entitled to recover damages for the half-day for which his workmen accepted the defendant's invitation. The court refused to interfere on the ground that the damages were excessive ; and Richardson, J., said : " The measure of damages he is entitled to receive from the defendant is not necessarily to be confined to the servants he might have in his employ at the time they were so enticed, or for that part of the day on which they absented themselves from his service, but he is entitled to recover damages for the loss he sustained by their leaving him at that critical period."¹ So where the defendant enticed away the farm hand of the plaintiff, the latter may recover the expense of an unsuccessful attempt to replace him, and the net profits made by men of fair business capacity out of the labors of such a hand during the period for which the hand was hired. (*)

§ 471. Seduction.—* The common-law action of case, by the father or master, for seducing a daughter or female servant, is one of a peculiar character. It is eminently a legal fiction : the demand is based upon the mere loss of service ; but the damages are very much at large, and in the discretion of the jury. It is very

¹ Gunter v. Astor, 4 Moore 12.

(*) Lee v. West, 47 Ga. 311; Smith v. Goodman, 75 Ga. 198.

curious to see how the practice of giving damages beyond the mere value of the service has grown up. As late as the latter part of the last century, in a case tried before Mr. Justice Chambre, the action being brought by the father for the seduction of his natural daughter, the judge charged the jury that they must consider the female merely in the character of a servant, and award the plaintiff compensation for the loss of service only.¹ In the year 1800, Lord Eldon, then chief justice of the Common Pleas, in an action tried before him, told the jury that they were to look, not merely to the loss of service, but to the *wounded feelings* of the party.² In 1805, Lord Ellenborough, in a case before him, told the jury that "damages might be given for the loss which the father sustained by being deprived of the *society* and *comfort* of his child, and by the *dishonor* which he receives."³ And finally, the same learned judge on a motion to set aside an inquisition in a case of seduction, on the ground of excessive damages, said that this proceeding was one *sui generis*, where, in estimating the damages, the parental feelings and the feelings of those who stood in *loco parentis*, had always been taken into consideration; and although it was difficult to conceive on what legal principles the damages could be extended ultra the injury arising from the loss of service, yet the practice was now inveterate, and could not be shaken.⁴ "The action for seduction," says the Supreme Court of New York, "is peculiar, and would seem to form an exception to the rule that actual damages only can be recovered when the action is for loss of service consequential upon a direct injury; but there the party directly injured, cannot sustain an action, and the rule of dam-

¹ Selwyn's Nisi Prius, 7th ed. 1116.

² See same note.

³ See note to *Andrews v. Askey*, 8 Car. & P. 7.

⁴ *Irwin v. Dearman*, 11 East 23.

ages has always been considered as founded upon special reasons only applicable to it."¹ In a case brought by the mother, in 1837, Tindal, Chief Justice of the English Common Pleas, directed the jury that they might give damages for the *distress* and *anxiety* of the plaintiff.² As to the right of recovery, however, the English cases adhere to the original idea on which the action is founded. So, if there is no proof of loss of service whatever, there can be no relief.³ So, although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover.⁴ In other words, without some damage to the plaintiff or master, occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief.**

§ 472. **Damages governed by legal rules.**—* Where the jury were directed or supposed they were directed, that damages might be given for bringing up the child, the fruit of the illicit connection, the Supreme Court of New York granted a new trial, on the ground that the plaintiff, the master, was under "no legal obligation to support and educate the child; that he could not be compelled to appropriate the proceeds of the verdict to that purpose; and that the verdict would not afford the defendant any exemption from his liability to provide for the child, when called on in the regular course of the law." (*) This, in effect, declares that the damages are to be measured by strict legal rules, or at least asserts the principle already stated, that even in cases of aggravation, where it appears that the jury did not intend to give vindictive, but only compensatory damages, and

¹ *Whitney v. Hitchcock*, 4 Den. 461.

² *Grinnell v. Wells*, 7 M. & G. 1033.

³ *Andrews v. Askey*, 8 C. & P. 7.

⁴ *Eager v. Grimwood*, 1 Ex. 61.

(*) See, also, *Hitchman v. Whitney*, 9 Hun 512; *Haynes v. Sinclair*, 23 Vt. 108; but see *Terry v. Hutchinson*, L. R. 3 Q. B. 599; 9 B. & S. 487.

on that point were wrongly instructed, such course will be taken as to restrict the compensation within legal limits.¹ **

§ 473. **General rule.**—In an action for the seduction of his daughter, the father, or one who stands in his place, recovers not only for the actual loss of his daughter's services and the medical expenses of her illness,^(*) but also for his wounded feelings and affections,^(*) for the wrong done him in his social and family relations,^(*) and for the stain and dishonor brought on the family.^(*) And in order to estimate such injuries, the general good character of the plaintiff's family may be shown.^(*)

§ 474. **Exemplary damages.**—As a general rule, exemplary damages may always be given.^(†) Where the relation of master and servant exists by convention only, as where the plaintiff's daughter is of age, the recovery will not necessarily be restricted to compensatory damages.^(*) Nor although the statute authorizes the daugh-

¹ *Sargent v. —*, 5 Cow. 106. See, also, *Edmondson v. Machell*, 2 T. R. 4.

(*) *Pruitt v. Cox*, 21 Ind. 15; *Coon v. Moffitt*, 3 N. J. L. 436; *Akerley v. Haines*, 2 Cai. 292; *Hogan v. Cregan*, 6 Robt. 138.

(*) *Herring v. Jester*, 2 Houst. 66; *Kendrick v. McCrary*, 11 Ga. 603; *Pruitt v. Cox*, 21 Ind. 15; *Felkner v. Scarlet*, 29 Ind. 154; *Taylor v. Shelkett*, 66 Ind. 297; *Hatch v. Fuller*, 131 Mass. 574; *Coon v. Moffitt*, 3 N. J. L. 436; *Hornketh v. Barr*, 8 S. & R. 36; *Clem v. Holmes*, 33 Gratt. 722.

(*) *Herring v. Jester*, 2 Houst. 66; *Parker v. Monteith*, 7 Ore. 277; *Clem v. Holmes*, 33 Gratt. 722.

(*) *Herring v. Jester*, 2 Houst. 66; *Kendrick v. McCrary*, 11 Ga. 603; *Felkner v. Scarlet*, 29 Ind. 154; *Taylor v. Shelkett*, 66 Ind. 297; *Wilhoit v. Hancock*, 5 Bush 567; *Coon v. Moffitt*, 3 N. J. L. 436; *Parker v. Monteith*, 7 Ore. 277; *Hornketh v. Barr*, 8 S. & R. 36; *Clem v. Holmes*, 33 Gratt. 722; *Patterson v. Wilcox*, 20 Up. Can. C. P. 385.

(*) *Parker v. Monteith*, 7 Ore. 277; *Wilson v. Sproul*, 3 Pen. & W. 49.

(*) *Edmondson v. Machell*, 2 T. R. 4; *Irwin v. Dearman*, 11 East, 23; *Ball v. Bruce*, 21 Ill. 161; *Bartley v. Richtmyer*, 4 N. Y. 38, 44; *Ingersoll v. Jones*, 5 Barb. 661.

(*) *Lipe v. Eisenlerd*, 32 N. Y. 229; *Badgley v. Decker*, 44 Barb. 577.

ter to sue in her own name, will they be thus restricted in an action brought by the father.(*)

§ 475. **Aggravation.**—Evidence of the pecuniary condition of both plaintiff and defendant has been held admissible, not for the purpose of ascertaining how much the defendant can pay, but how much the plaintiff has been injured.(b) Evidence of an abortion produced by the defendant is not inadmissible on the ground that the damages it tends to prove are too remote.(c) It has been held that in this action no evidence can be given as to any promise of marriage, either with reference to the right of action or measure of damages; the remedy for the breach of that contract belonging to the female in her own name.(d) Thus, in the King's Bench, Lord Ellenborough said: "The daughter may be asked whether the defendant paid his addresses to her in an honorable way; further than that you can on no account go."¹ So, in New York, in such a case, it has been held incorrect to admit this description of evidence, whether the judge instructs the jury that they may give damages for the seduction, and also for the breach of the promise, or whether he admits it only to prove the seduction, but not to enhance the damages.²

§ 476. **Mitigation.**—Proof of indifference on the plain-

¹ *Dodd v. Norris*, 3 Camp. 519. See, *Mead*, 7 Wend. 193. See, also, *Brownell v. M'Ewen*, 5 Denio 367; *Wells v. Tullidge v. Wade*, 3 Wils. 18.

² *Foster v. Scofield*, 1 Johns. 297; *Padgett*, 8 Barb. 323.
Clark v. Fitch, 2 Wend. 459; *Gillet v.*

(*) *Stevenson v. Belknap*, 6 Ia. 97.

(b) *Herring v. Jester*, 2 Houst. 66; *White v. Murtland*, 71 Ill. 250; *McAulay v. Birkhead*, 13 Ired. 28; and to affect exemplary damages, *Clem v. Holmes*, 33 Gratt. 722; *Lavery v. Crooke*, 52 Wis. 612. But *contra*, *Watson v. Watson*, 53 Mich. 168; *Dain v. Wycoff*, 7 N. Y. 191.

(c) *White v. Murtland*, 71 Ill. 250; *Klopfer v. Bromme*, 26 Wis. 372.

(d) *Whitney v. Elmer*, 60 Barb. 250. *Contra*, *Parker v. Monteith*, 7 Ore 277.

tiff's part, in affording opportunities of criminal intercourse between his daughter and the defendant, may be admitted in mitigation of damages,^(*) but not of a seeming insensibility on the part of the father to his daughter's disgrace.^(b) Nor is it competent for the defendant to show that the daughter consented willingly to the seduction, nor even that she, in fact, seduced the defendant, her consent not depriving the plaintiff of his right of action.^(c) But the unchastity of the daughter previous to the defendant's act will mitigate the damages, and may reduce them to mere compensation for loss of service and expense of lying in.^(d) Nor can an offer to marry the female be given in evidence to mitigate the damages.^(e) But actual marriage may be.^(f) In an action for the seduction of the plaintiff's daughter, the defendant can show that the plaintiff was not, in fact, married to his reputed wife, as it shows that the plaintiff was not entitled to the services of his daughter.^(g) A recovery by the daughter for the seduction where such an action can be maintained, does not mitigate the damages recoverable by the father.^(h)

§ 477. *Action by the party seduced.*—Where the woman is allowed (by statute) to recover in her own name for seduction, the measure of her recovery is subject to the same rules. Thus a woman may recover for wounded feelings and dishonor,⁽ⁱ⁾ for loss of social standing,^(l) and

(*) *Zerfing v. Mourer*, 2 Greene (Ia.) 520.

(b) *Bolton v. Miller*, 6 Ind. 262.

(c) *McAulay v. Birkhead*, 13 Ired. 28.

(d) *Akerley v. Haines*, 2 Cal. 292; *Hogan v. Cregan*, 6 Robt. 138.

(e) *White v. Murtland*, 71 Ill. 250; *Ingersoll v. Jones*, 5 Barb. 661.

(f) *Eichar v. Kistler*, 14 Pa. 282.

(g) *Howland v. Howland*, 114 Mass. 517.

(h) *Pruitt v. Cox*, 21 Ind. 15.

(i) *Simons v. Busby*, 119 Ind. 13.

(l) *Hawn v. Banghart*, 76 Ia. 683.

for consequences such as pregnancy, childbirth, sickness, and the like.^(*)

§ 478. **Criminal conversation.**—In the assessment of damages against a co-respondent in this action, the measure of damages is the value of the wife of whom the husband has been deprived.^(b) It has been said that the husband can recover more than nominal damages, even if he had not lost the affection of his wife by the act, nor had his family broken up, nor his domestic relations impaired.^(c) In a case at Nisi Prius, where the husband was unaware of his wife's dishonor till she made the disclosure to him on her dying bed, and he continued to treat her with great kindness till her death, which occurred in the same month, Mr. Justice Coleridge, while instructing the jury against the allowance of vindictive damages, told them to give damages for the shock to the husband's feelings and *the loss of his wife's society* down to the time of her death.^(d) In *Yundt v. Hartrunft*^(e) Walker, C. J., said :

“The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true, that, because appellee was absent from home he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had the right to the teachings of a

(*) *McCoy v. Trucks*, 121 Ind. 292.

(b) *Cowing v. Cowing*, 33 L. J. N. S. Prob. 149.

(c) *Stumm v. Hummel*, 39 Ia. 478.

(d) *Wilton v. Webster*, 7 C. & P. 198.

(e) 41 Ill. 9, 12.

virtuous, and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect to her family and her example to her children."

§ 479. **Aggravation.**—If the co-respondent's fortune was used by him as a means of the seduction, it is said, in England, that it may be taken into account, but not otherwise.^(a) In *Peters v. Lake* ^(b) it was held that evidence of the defendant's pecuniary ability was admissible as affecting the question of exemplary damages.

§ 480. **Mitigation.**—Proof of the ill-treatment of the wife by the husband before the criminal intercourse, may be received in mitigation;^(c) so may the fact that the plaintiff is dissolute and immoral;^(d) or that the general character of the wife is bad.^(e) In *Conway v. Nicol* ^(f) it was held proper to show that the wife, before her marriage, had given birth to a child; but this must be taken in connection with the fact that the defendant was the father of the child, and that the plaintiff's wife had been true to her marriage vows, except with the defendant. In *Stumm v. Hummel* ^(g) it was held competent to show, for the purpose of ascertaining the amount of damages, that the plaintiff's wife had, before marriage, lived in the defendant's family, when he had intercourse with her; and that he had induced her to marry the plaintiff on the ground that the latter would make a good husband, and that he (the defendant) would continue

^(a) *Cowing v. Cowing*, 33 L. J. N. S. Prob. 149.

^(b) 66 Ill. 206.

^(c) *Coleman v. White*, 43 Ind. 429; *Dance v. McBride*, 43 Ia. 624; *Palmer v. Crook*, 7 Gray, 418.

^(d) *Bennett v. Smith*, 21 Barb. 439.

^(e) *Clouser v. Clapper*, 59 Ind. 548.

^(f) 34 Ia. 533.

^(g) 39 Ia. 478.

to have intercourse with her. It was also held that, if the wife's bad conduct was confined to her intimacy with the defendant, and the plaintiff was induced to marry her on the recommendation that she was a good girl, then her intercourse with the defendant before marriage could not be considered in mitigation of damages. It has been held competent to show, in mitigation of damages, that the plaintiff's wife was an actress; that he concealed his marriage from his wife's mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.¹

PERSONAL INJURY.

§ 481. **General rule.**—We now proceed to consider another class of cases, namely, actions for personal injuries. And here, too, though malice is not the gist of the action, the circumstances of the injury have much bearing upon the amount of loss, and matters of aggravation and mitigation become important. In actions for personal injury, therefore, much latitude is necessarily given the jury. The Supreme Court of California, in enlarging upon the sound and familiar rule that courts will not disturb the verdict in cases of personal tort, unless it is obviously not the result of cool and dispassionate deliberation, broadly declares that in such actions "the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiassed judgment of the jury."^(*) So the Supreme Court of the United

¹ *Calcraft v. Earl of Harborough*, 4 C. & P. 499.

(*) *Aldrich v. Palmer*, 24 Cal. 513; *acc. Wadsworth v. Treat*, 43 Me. 163; *Coffin v. Coffin*, 4 Mass. 1; *Com. v. Sessions of Norfolk*, 5 Mass. 435.

States say that in these actions "there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body."^(a) The damages are not, however, wholly at large, but must be controlled by the evidence.^(b) The price at which one would voluntarily undergo pain and disfigurement is not the measure of recovery for such injury.^(c) The damages for a personal injury in cases of simple trespass free from malice, or of simple negligence (where the rule seems to be the same), should, as far as a money standard is applicable, be such as to compensate the injured party for such loss of time, medical and other expenses, physical pain and mental distress, as are fairly and reasonably the plain consequences to him of the injury.^(d) Where the health of the plaintiff,

(a) *Illinois C. R.R. Co. v. Barron*, 5 Wall. 90, 105, *per* Nelson, J.

(b) *Davis v. Central R.R. Co.*, 60 Ga. 329; *Johnson v. Tillson*, 36 Ia. 89.

(c) *Union P. Ry. Co. v. Milliken*, 8 Kas. 647, *per* Brewer, J.

(d) *Phillips v. Southwestern Ry. Co.*, 4 Q. B. D. 406; *Wade v. LeRoy* 20 How. 34; *Vicksburg & M. R.R. Co. v. Putnam*, 118 U. S. 545; *Hanson v. Fowle*, 1 Sawy. 539; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21; *Potts v. Chicago C. Ry. Co.*, 33 Fed. Rep. 610; *Saldana v. Galveston, H. & S. A. Ry. Co.*, 43 Fed. Rep. 862; *South & N. A. R.R. Co. v. McLendon*, 63 Ala. 266; *St. Louis, I. M. & S. R.R. Co. v. Cantrell*, 37 Ark. 519; *Wall v. Cameron*, 6 Col. 275; *Wall v. Livezey*, 6 Col. 465; *Wallace v. Wilmington & N. R.R. Co.*, 18 Atl. Rep. 818 (Del.); *Peoria Bridge Association v. Loomis*, 20 Ill. 235; *Pierce v. Millay*, 44 Ill. 189; *Chicago & A. R.R. Co. v. Wilson*, 63 Ill. 167; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Langlass*, 66 Ill. 361; *Chicago v. Elzeman*, 71 Ill. 131; *Sheridan v. Hibbard*, 119 Ill. 307; *Indianapolis v. Gaston*, 58 Ind. 224; *Lucas v. Flinn*, 35 Ia. 9; *Muldowney v. Illinois C. Ry. Co.*, 36 Ia. 462; *McKinley v. Chicago & N. W. Ry. Co.*, 44 Ia. 314; *Morris v. Chicago, B. & Q. R.R. Co.*, 45 Ia. 29; *Stafford v. Oskaloosa*, 64 Ia. 251; *Tefft v. Wilcox*, 6 Kas. 46; *Kansas P. Ry. Co. v. Pointer*, 9 Kas. 620; *Missouri, K. & T. Ry. Co. v. Weaver*, 16 Kas. 456 (*semble*); *Central P. Ry. Co. v. Kuhn*, 86 Ky. 578; *Donnell v. Sandford*, 11 La. Ann. 645; *Mason v. Ellsworth*, 32 Me. 271; *Blackman v. Gardiner & P. Bridge*, 75 Me. 214; *Bannon v. Baltimore & O. R.R. Co.*, 24 Md. 108; *Huizega v. Cutler & S. Lumber Co.*, 51 Mich. 272; *Power v. Harlow*, 57 Mich. 107; *Sherwood*

already impaired, was further injured by the defendant, the measure of damages is compensation for the additional impairment of health, and for obstruction to recovery.^(*)

§ 482. *Loss of time.*—Where the butler of a London club brought his action against an architect employed to do repairs on the club-house, and his agents, and averred that they put in gas so negligently that it exploded, and crippled the plaintiff for life, and he was discharged for incapacity to do the duties of his place, it was insisted for the plaintiff that the measure of damages was the amount of money which would be required to purchase an annuity for the plaintiff equal to the sum which he was receiving from the club; but Lord Abinger ruled otherwise; and after commenting on the fact that neither party was in actual fault, said: "If it be asked that the jury are to give damages equal to an annuity, it may be demanded, what right has the plaintiff to calculate that he would have continued in office to the end of his life? I think it would be absurd to make the value of the

v. Chicago & W. M. Ry. Co., 46 N. W. Rep. 773 (Mich.); *Memphis & C. R.R. Co. v. Whitfield*, 44 Miss. 466; *West v. Forrest*, 22 Mo. 344; *Russell v. Columbia*, 74 Mo. 480; *Steiner v. Moran*, 2 Mo. App. 47; *Chicago, B. & Q. R.R. Co. v. Starmer*, 26 Neb. 630; *Quigley v. Central P. R.R. Co.*, 11 Nev. 350; *Cohen v. Eureka & P. R.R. Co.*, 14 Nev. 376; *Ransom v. New York & E. Ry. Co.*, 15 N. Y. 415; *Morse v. Auburn & S. Ry. Co.*, 10 Barb. 621; *Quinn v. Long Island R.R. Co.*, 34 Hun 331; *Rown v. Christopher & T. S. R.R. Co.*, 34 Hun 471; *Harding v. New York, L. E. & W. R.R. Co.*, 36 Hun 72; *Keyes v. Devlin*, 3 E. D. Smith, 518; *Brignoli v. Chicago & G. E. R.R. Co.*, 4 Daly 182; *Oliver v. North P. T. Co.*, 3 Ore. 84; *Pennsylvania & O. C. Co. v. Graham*, 63 Pa. 290; *Scott v. Montgomery*, 95 Pa. 444; *Houston & T. C. Ry. Co. v. Boehm*, 57 Tex. 152; *Giblin v. McIntyre*, 2 Utah 384; *Daingersfield v. Thompson*, 33 Gratt. 136; *Wilson v. Wheeling*, 19 W. Va. 323; *Goodno v. Oshkosh*, 28 Wis. 300; *Stewart v. Ripon*, 38 Wis. 584; *Hulehan v. Green Bay, W. & S. P. R.R. Co.*, 68 Wis. 520; *King v. Oshkosh*, 75 Wis. 517.

(*) *Bray v. Latham*, 81 Ga. 640.

annuity the measure of the damages.”¹ In determining this item of compensation, the profits of a future business of which the plaintiff has been deprived, are in general too remote as an element in the estimate of the damages, although it has been said that he is entitled to recover for the diminution of the receipts of his business, resulting from such inability to attend to it, as the injury caused him.^(a) This latter point is distinctly held in *Hanover R.R. Co. v. Coyle*.^(b) The plaintiff in that case was a peddler, and on the trial below, offered to prove the nature and character of his business, the extent of his loss of time, also of the percentage on the goods sold by him in his usual course of business, the loss of interest of money received for the same, in consequence of the injuries received, and the annual amount of sales made by him. The evidence was admitted against the objection of the defendant, who excepted. On error it was held by the Supreme Court that the evidence had been correctly admitted as bearing directly upon the question of damages, in affording a means of computing the plaintiff's loss for the time he was confined by his injuries, and prevented from carrying on his business.^(c) When damages are claimed for loss of business, and no proof is offered of the value of the business, no damages on that account can be given.^(d) In assault and battery, the plaintiff can recover the expense of hiring labor while unable to perform work which he, when well, performed himself,^(e) but the expenses of living cannot be

¹ *Rapson v. Cubitt*, 1 Car. & Marsh. 64.

(a) *Kinney v. Crocker*, 18 Wis. 74.

(b) 55 Pa. 396.

(c) See this question discussed fully, § 180.

(d) *Klein v. Second Avenue R.R. Co.*, 54 N. Y. Super. Ct. 164.

(e) *Ashcraft v. Chapman*, 38 Conn. 230.

included in the damages in addition to the value of the plaintiff's time.^(*)

§ 483. **Medical expenses.**—The medical expenses, including the cost of medicine and nursing, may always be recovered.^(b) The plaintiff may recover, as part of his damages, the amount of a surgeon's bill which he incurred for treating his injuries, although, before the trial, the bill had been voluntarily paid by the trustees of the township, to whom he was under no legal liability to refund the amount.^(c) He may recover them, although they are yet unpaid,^(d) and he may recover compensation for the services of a daughter in nursing him, though the services were rendered gratuitously.^(e) The amount reasonably paid for going to a distant city for special medical treatment may be recovered.^(f) Medical expenses may be recovered, though not specially named in the declaration.^(g) But it is not enough to show the amount paid for medical expenses; it must also appear that the amount is a reasonable one.^(h)

§ 484. **Mental and physical suffering.**—Future suffering is to be considered.⁽ⁱ⁾ Where a surgeon is sued for malpractice compensation is not to be recovered for the whole amount of suffering, but only such additional

(*) *Graeber v. Derwin*, 43 Cal. 495.

(b) See, in addition to the authorities cited in § 481, the following: *Beardsley v. Swann*, 4 McLean 333; *Metcalf v. Baker*, 57 N. Y. 662; *Sheehan v. Edgar*, 58 N. Y. 631.

(c) *Klein v. Thompson*, 19 Oh. St. 569. }

(d) *Lunsford v. Walker*, 8 So. Rep. 386 (Ala.); *Donnelly v. Hufschmidt*, 79 Cal. 74.

(e) *Varnham v. Council Bluffs*, 52 Ia. 698.

(f) *Sherwood v. Chicago & W. M. Ry. Co.*, 46 N. W. Rep. 773 (Mich.).

(g) *Folsom v. Underhill*, 36 Vt. 580.

(h) *Gumb v. Twenty-third St. Ry. Co.*, 114 N. Y. 411.

(i) *Fry v. Dubuque & S. W. R.R. Co.*, 45 Ia. 416; *Aaron v. Second Ave. R.R. Co.*, 2 Daly 127; *Stewart v. Ripon*, 38 Wis. 584.

suffering as was caused by the malpractice.^(*) Where a man who was suffering from hernia was wrongfully expelled from a railroad train, it was held that the fact of his hernia might be shown, though no aggravation of his injury was proved; for it tended to show increased mental suffering.^(b) Thomas, J., said:

"The conductor put the plaintiff in fear by compelling him to accept the alternative of jumping from the platform or being pushed off in the dark, while the train was moving very fast, as it appeared to the plaintiff, and his fear must naturally have been greatly intensified by reason of his physical condition, and it was proper to put the jury in possession of all the facts relating to his physical condition, for the purpose of ascertaining the extent of his mental suffering as an element of damage."

§ 485. Loss of capacity to labor.—Compensation should be given for permanent disability or loss of capacity for labor.^(c) And in ascertaining the proper amount in case

(*) *Wenger v. Calder*, 78 Ill. 275.

(b) *Fell v. Northern P. R.R. Co.*, 44 Fed. Rep. 248.

(c) *Phillips v. Southwestern Ry. Co.*, 4 Q. B. D. 406; *Fair v. London & N. W. Ry. Co.*, 21 L. T. Rep. 326; *Vicksburg & M. R.R. Co. v. Putnam*, 118 U. S. 545; *Potts v. Chicago C. Ry. Co.*, 33 Fed. Rep. 610; *Campbell v. Pullman P. C. Co.*, 42 Fed. Rep. 484; *South & N. A. R.R. Co. v. McLen-*
don, 63 Ala. 266; *Cameron v. Vandegriff*, 13 S. W. Rep. 1092 (Ark.); *Wallace v. Wilmington & N. R.R. Co.*, 18 Atl. Rep. 818 (Del.); *Frink v. Schroyer*, 18 Ill. 416; *Pierce v. Millay*, 44 Ill. 189; *Chicago v. Langlass*, 52 Ill. 256; 66 Ill. 361; *Toledo, W. & W. Ry. Co. v. Baddeley*, 54 Ill. 19; *Chicago & A. R.R. Co. v. Wilson*, 63 Ill. 167; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Elzeman*, 71 Ill. 131; *Sheridan v. Hibbard*, 119 Ill. 307; *Indianapolis v. Gaston*, 58 Ind. 224; *McKinley v. Chicago & N. W. Ry. Co.*, 44 Ia. 314; *Morris v. Chicago, B. & Q. R.R. Co.*, 45 Ia. 29; *Stafford v. Oskaloosa*, 64 Ia. 251; *Knapp v. Sioux City & P. Ry. Co.*, 71 Ia. 41; *Tefft v. Wilcox*, 6 Kas. 46; *Kansas P. Ry. Co. v. Pointer*, 9 Kas. 620; *Missouri, K. & T. Ry. Co. v. Weaver*, 16 Kas. 456 (*semble*); *Central P. Ry. Co. v. Kuhn*, 86 Ky. 578; *Donnell v. Sandford*, 11 La. Ann. 645; *Blackman v. Gardiner & P. Bridge*, 75 Me. 214; *McMahon v. Northern C. Ry. Co.*, 39 Md. 438; *Memphis & C. R.R. Co. v. Whitfield*, 44 Miss. 466; *Whalen v. St. Louis, K. C. & N. Ry. Co.*, 60 Mo. 323; *Ridenhour v. Kansas City C. Ry. Co.*, 13 S. W. Rep. 889 (Mo.); *Steiner v. Moran*, 2 Mo. App. 47; *Chicago, B. & Q. R.R.*

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of disability, the jury may take into consideration the nature of the plaintiff's previous occupation,^(a) and the kind and amount of physical and mental labor to which he has been accustomed.^(b) In *Fulsome v. Concord*,^(c) it was held correct to instruct the jury that in estimating the plaintiff's prospective damages they should reduce his losses to their present worth, or to such a sum as, being put at interest, would amount to the sum they found the plaintiff would lose in the future, by the injuries. In Texas it has been said that in actions for personal injury where the basis of damages is the reduced capacity to earn money, it is error to instruct the jury to give the plaintiff a sum which put at interest will produce annually a sum equal to the difference between what he could earn before and after the injury. They should be instructed to give an amount which would purchase an annuity equal to the difference during the probable life of the plaintiff, calculated upon a reliable estimate of the average duration of human life.^(d) In estimating this amount, life tables may be used.^(e) Evidence of the plaintiff's habitual drunkenness, incapacitat-

Co. v. Starmer, 26 Neb. 630; *Cohen v. Eureka & P. R.R. Co.*, 14 Nev. 376; *Holyoke v. Grand T. Ry. Co.*, 48 N. H. 541; *Filer v. New York C. R.R. Co.*, 49 N. Y. 42; *Oliver v. North P. T. Co.*, 3 Ore. 84; *Pennsylvania & O. C. Co. v. Graham*, 63 Pa. 290; *Pittsburg, A. & M. P. Ry. Co. v. Donahue*, 70 Pa. 119; *Scott v. Montgomery*, 95 Pa. 444; *Houston & T. C. R.R. Co. v. Willie*, 53 Tex. 318; *Houston & T. C. Ry. Co. v. Boehm*, 57 Tex. 152; *Giblin v. McIntyre*, 2 Utah 384; *Weisenberg v. Appleton*, 26 Wis. 56; *Goodno v. Oshkosh*, 28 Wis. 300; *Hulehan v. Green Bay, W. & S. P. R.R. Co.*, 68 Wis. 520; *King v. Oshkosh*, 75 Wis. 517.

^(a) *Nebraska City v. Campbell*, 2 Black 590; *Moore v. Central R.R.*, 47 Ia. 688; *Caldwell v. Murphy*, 11 N. Y. 416; *Nones v. Northouse*, 46 Vt. 587; *Ripon v. Bittel*, 30 Wis. 614.

^(b) *Ballou v. Farnum*, 11 All. 73.

^(c) 46 Vt. 135.

^(d) *Houston & T. C. R.R. Co. v. Willie*, 53 Tex. 318.

^(e) *Vicksburg & M. R.R. Co. v. Putnam*, 118 U. S. 545; *Knapp v. Sioux City & P. Ry. Co.*, 71 Ia. 41.

ing him for labor, is proper in reference to the amount of the compensatory damages he should receive for a permanent disability.^(*) Damages for permanent deformity, resulting from an injury, may be allowed, but not the expenses of surgical operations undertaken after the wound is healed, for the purpose of removing the blemish.^(b)

§ 486. Action by married woman or minor.—Where the suit is by a married woman, her loss of time is no part of the injury for which compensation can be given. Her time and service belong to the husband, and for a loss of them he must sue alone.^(c) And for the same reason she cannot recover the amount of medical expenses, unless actually paid out of her separate estate.^(d) She may recover compensation for her pain and suffering,^(e) and it is held that she may recover for permanent impairment of her earning capacity.^(f) In New York she is allowed

(*) *Cleveland & P. R.R. Co. v. Sutherland*, 19 Oh. St. 151.

(b) *The Oriflamme*, 3 Sawy. 397; *Karr v. Parks*, 44 Cal. 46.

(c) *Ohio & M. Ry. Co. v. Cosby*, 107 Ind. 32; *Thomas v. Brooklyn*, 58 Ia. 438; *Jordan v. Middlesex R.R. Co.*, 138 Mass. 425; *Klein v. Jewett*, 26 N. J. Eq. 474; *Barnes v. Martin*, 15 Wis. 240. Therefore it is error to instruct the jury that the damages under statutes giving an action for causing death, are the same in the case of a married and an unmarried woman. An unmarried woman is entitled to her whole earnings. The time of a married woman is not exclusively her own, but a portion of it must be devoted to the care of the family and aiding her husband. *Stulmuller v. Cloughly*, 58 Ia. 738.

(d) *Tompkins v. West*, 56 Conn. 478; *Lewis v. Atlanta*, 77 Ga. 756; *Ohio & M. Ry. Co. v. Cosby*, 107 Ind. 32; *Jordan v. Middlesex R.R. Co.*, 138 Mass. 425; *Klein v. Jewett*, 26 N. J. Eq. 474; *Burnham v. Webster*, 54 N. Y. Super. Ct. 30.

(e) *Green v. Pennsylvania R.R. Co.*, 36 Fed. Rep. 66; *Tompkins v. West*, 56 Conn. 478; *Johnson v. Baltimore & P. R.R. Co.*, 17 D. C. (6 Mack.) 232; *Ohio & M. Ry. Co. v. Cosby*, 107 Ind. 32; *Jordan v. Middlesex R.R. Co.*, 138 Mass. 425; *Klein v. Jewett*, 26 N. J. Eq. 474.

(f) *Ohio & M. Ry. Co. v. Cosby*, 107 Ind. 32; *Jordan v. Middlesex R.R. Co.*, 138 Mass. 425.

to recover for the loss of her earning power over and above her domestic services; (*) and it has been held that she may recover for inability to perform services personal to herself, such as dressing and eating. (b) A minor cannot recover for loss of time or earning capacity during his minority. (c) He may recover for his mental and physical suffering, and for any permanent injury. (d) But it has been held that a minor without parent or guardian may recover compensation for medical expenses. (e)

§ 487. **Mitigation—Provocation.**—One of the simplest forms of mitigatory evidence is always provocation. "In actions for personal wrongs and injuries," says Lord Abinger,¹ at *Nisi Prius*, "a defendant who does not deny that the verdict must pass against him, may give evidence to show that the plaintiff in some degree brought the thing upon himself." So, in an action for assault and battery, a libel published by the plaintiff on the defendant may be given in evidence in mitigation of damages, even though it be at the time the subject of a cross-action; but that being so, the defendant ought not to derive much advantage from it in mitigating the damages.² The provocation, to entitle it to be given in evidence in mitigation of damages, must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it. (f) In an action

¹ *Fraser v. Berkeley*, 7 C. & P. 621.

² *Ibid.*

(a) *Brooks v. Schwerin*, 54 N. Y. 343; *Minick v. Troy*, 19 Hun 253; *Blaechinska v. Howard Mission, etc.*, 56 Hun 322.

(b) *Johnson v. Baltimore & P. R.R. Co.*, 17 D. C. (6 Mack.) 232.

(c) *Gulf, C. & S. F. Ry. Co. v. Evansich*, 63 Tex. 54; *Texas & P. Ry. Co. v. Morin*, 66 Tex. 225.

(d) *McMilan v. Union P. B. W.*, 6 Mo. App. 434.

(e) *Forbes v. Loftin*, 50 Ala. 396.

(f) *Murphy v. McGrath*, 79 Ill. 594; *Ireland v. Elliott*, 5 Ia. 478; *Turner*

for an assault and battery, where the altercation grew out of a question of veracity between the parties, the defendant was allowed to show that the *truth* of the matter in dispute was with him, in mitigation of damages.^(*) In *Cushman v. Waddell*,^(b) which was an action by a schoolmaster against a parent for a severe beating, the court held that no provocation could excuse the defendant from making full compensation for all the injury the plaintiff had suffered by the unlawful attack on his person. But if the jury were satisfied that, without any previous malice towards the plaintiff or any deliberate design to injure him in person or the estimation of the public, he acted in the heat of passion, caused by the appearance and account of his son, it was a circumstance which ought to operate powerfully to reduce the damages to such as were compensatory. Mere words may be proved in mitigation of damages.^(c) But words uttered by the plaintiff against the defendant on a former occasion, and repeated to the defendant, are not admissible in mitigation.^(d) The fact that the parties fought by mutual agreement may be shown in mitigation.^(e) But in an action by a husband and wife for an assault and battery on the wife, previous misconduct of the husband cannot be received in mitigation. Nor, it seems, where the misconduct consisted in fraudulently obtaining pos-

v. Footman, 71 Me. 218; *Gaither v. Blowers*, 11 Md. 536; *Byers v. Horner*, 47 Md. 23; *Tyson v. Booth*, 100 Mass. 258; *Martin v. Minor*, 50 Miss. 42; *Collins v. Todd*, 17 Mo. 537; *Corning v. Corning*, 6 N. Y. 97; *Willis v. Forrest*, 2 Duer 310; *Johnston v. Crawford*, 62 N. C. (Phillips) 342.

Provocation does not mitigate compensatory damages: *Goldsmith v. Joy*, 61 Vt. 488.

(*) *Marker v. Miller*, 9 Md. 338.

(b) 1 Bald. 57.

(c) *Keyes v. Devlin*, 3 E. D. Smith 518.

(d) *Jarvis v. Manlove*, 5 Harr. 452.

(e) *Barholt v. Wright*, 45 Oh. St. 177.

session of premises, and the assault and battery were perpetrated in forcibly turning out the fraudulent occupant, could such fraud be shown in mitigation of any real damages sustained by him. It could be received in mitigation of exemplary damages only, and then only where the fraud or its discovery was very recent and the defendant acted under the consequent excitement of the moment.^(*)

§ 488. **Bad character of the plaintiff.**—The plaintiff's bad character and association with persons of ill repute does not palliate an assault, and cannot mitigate the damages.^(b) Nor can a person guilty of wilful assault and battery show that, from the intemperate habits of the other party, the injury was more aggravated than it would have been upon a person of temperate habits.^(c)

§ 489. **Criminal conviction.**—Nor can the defendant in a civil action for an assault and battery be permitted to prove in mitigation of damages that he had been indicted, convicted, and fined for the same offense. An indictment is intended as a vindication of public justice; an action is brought for compensation for private injury. The object of the two proceedings is entirely distinct, and the one should not interfere with the course of the other.^(d) So the fact that only a nominal fine has been paid in a criminal action will not increase damages.^(e)

(*) *Jacobs v. Hoover*, 9 Minn. 204.

(b) *Bruce v. Priest*, 5 All. 100; *Johnson v. Wells*, 6 Nev. 224; *Corning v. Corning*, 6 N. Y. 97. But *contra*, *Abbot v. Tolliver*, 71 Wis. 64, in which case Cole, C. J., said (at p. 70): "The fact of chastity, as well as other personal virtues and business qualifications, would be proper matters for a jury to consider in making up their verdict as to what damages should be given as a compensation for the injury."

(c) *Littlehale v. Dix*, 11 Cush. 364.

(d) *Lucas v. Flinn*, 35 Ia. 9; *Wheatley v. Thorn*, 23 Miss. 62; *Wolff v. Cohen*, 8 Rich. L. 144.

(e) *Honaker v. Howe*, 19 Gratt. 50.

§ 490. **Circumstances of the parties.**—The amount of damages is not affected by the wealth or poverty of the plaintiff.^(*) Nor can he augment damages by proving *that* he has a wife and several small children.^(b) In *Illinois Central R.R. Co. v. Nelson*,^(c) an action for being wrongfully put off a train, it was held error to charge the jury that they were "not confined to the same amount of damages or the same rules as if the suit was between individuals, as the public have an interest in such cases which may be considered and looked to in assessing the damages." In *Toledo, Wabash & W. Ry. Co. v. Smith*^(d) it was held to be error to tell the jury that in assessing damages against a company and a conductor, for expelling the plaintiff from the cars, they could consider the ability of the company to pay.

§ 491. **Avoidable consequences.**—Where the plaintiff was injured by a train, but did not employ a physician for a week after the injury, it was held that she was bound to take ordinary care to make the damages as small as possible, and if she did not, she could not recover for the damages resulting.^(e)

(*) *Barbour Co. v. Horn*, 48 Ala. 566; *Shea v. R.R. Co.*, 44 Cal. 414; *Malone v. Hawley*, 46 Cal. 409; *Vosberg v. Putney*, 47 N. W. Rep. 99 (Wis.), (wealth of father of minor plaintiff). But *contra*, *Cochran v. Ammon*, 16 Ill. 316, where Skinner, J., said: "The pain and suffering may be much greater where, from his pecuniary condition, the husband is unable to furnish medical aid, remedies, apartments, and nursing, such as ample means would afford," and therefore the pecuniary condition of the husband "tended to show the extent of the injury to the wife." In accordance with this case is *Eltringham v. Earhart*, 67 Miss. 488.

(b) *Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg, F. W. & C. Ry. Co. v. Powers*, 74 Ill. 341; *Stockton v. Frey*, 4 Gill 406; *Louisville & N. R.R. Co. v. Gower*, 85 Tenn. 465.

(c) 59 Ill. 110.

(d) 57 Ill. 517.

(e) *Allender v. Chicago, R. I. & P. R.R. Co.*, 37 Ia. 264.

CHAPTER XIV.

MEASURE OF DAMAGES IN ACTIONS FOR THE CONVERSION OF PERSONAL PROPERTY.

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| § 492. Forms of action. | § 500. Severance from the freehold. |
| 493. General rule in cases of conversion. | 501. The rule in England. |
| 494. Conversion by temporary wrongful use. | 502. Technical rule followed in some jurisdictions. |
| 495. Value, how determined. | 503. Defendant generally allowed value of his labor. |
| 496. Value, where to be estimated. | 504. Sale by wanton trespasser. |
| 497. Value, when to be estimated. | 505. Confusion. |
| 498. Natural increase. | 506. Consequential damages. |
| 499. Property increased in value by the defendant. | |

§ 492. *Forms of action.*—* Trover is the form of action prescribed by the common law, where damages are demanded for specific personal property which has been wrongfully appropriated, or, in more technical language, converted to the use of any other than its rightful owner. It was often brought at the option of the plaintiff in cases where assumpsit, and in others where trespass, or replevin, would lie.¹ The consequences flowing from the election of assumpsit are well stated in the language of Lord Ellenborough, C. J. :

“In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money, and takes to the net proceeds of the sale as the value of the goods,^(*) subject, of course, to all the

¹ *Barker v. Cory*, 15 Oh. 9.

(*) *De Clerq v. Mungin*, 46 Ill. 112.

consequences of considering the demand in question as a *debt*, and, amongst others, to that of the defendants having a right of set-off, if they should happen to have any counter-demand against the plaintiff."***

Assumpsit for money had and received is the proper form of action when the defendant has received money, or what is to be treated as such, to the use of the plaintiff; but it will not lie for stocks, goods, or other articles, unless by the understanding of the parties they were to be treated as money. Accordingly, where the plaintiff sued in this form of action, at a time when gold had risen to a premium, to recover a sum of gold which had been deposited with the sheriff's deputy as bail, the recovery was limited to the value of the gold as money, with interest.^(*) But in an action of trover, for the value of certain special deposits in coin, it was held, by the Supreme Court of Missouri, that the measure of damages was the *value* of the coin at the date of its conversion.^(b) In *Stevens v. Low*¹ where goods having been sold at an agreed price, to be paid in notes, and delivered conditionally, and the condition being broken, trover was brought for the goods, the court said that if assumpsit had been brought, the plaintiff would have been entitled to the *agreed* value; but that in trover the *value* and interest was the true measure, and that the defendant was at liberty to show that the value of the property was much less than the agreed price. And this is in accordance with the analogous cases brought on implied or express warranties of chattels, which will be considered later.

¹ *Hunter v. Prinsep*, 10 East 378, 391.

² 2 Hill 132.

(*) *Frothingham v. Morse*, 45 N. H. 545.

(b) *Coffey v. National Bank of Missouri*, 46 Mo. 140.

§ 493. **General rule in cases of conversion.**—We now come to the examination of the rules which govern damages in the common-law action of trover, or in actions where redress is demanded for the wrongful conversion of specific articles of personal property. In an action for the conversion of personal property, the measure of damages is the value of the property at the time of the conversion, with interest. (*)

§ 494. **Conversion by temporary wrongful use.**—Although

(*) *Watson v. McLean*, 1 E. B. & E. 75; *Mulliner v. Florence*, 3 Q. B. Div. 484; *Reid v. Fairbanks*, 13 C. B. 692; *Johnson v. Lancashire & Y. Ry. Co.*, 3 C. P. D. 499; *Watt v. Potter*, 2 Mas. 77; *Scully v. Briddle*, 2 Wash. C. C. 150; *Williams v. Crum*, 27 Ala. 468 (*semble*); *Ryburn v. Pryor*, 14 Ark. 505; *Jefferson v. Hale*, 31 Ark. 286; *Cassin v. Marshall*, 18 Cal. 689; *Barrante v. Garratt*, 50 Cal. 112; *Sutton v. Dana*, 25 Pac. Rep. 90 (Col.); *Swift v. Barnum*, 23 Conn. 523 (*semble*); *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*, 26 Conn. 483; *Vaughan v. Webster*, 5 Harr. 256; *Robinson v. Hartridge*, 13 Fla. 501; *Skinner v. Pinney*, 19 Fla. 42; *Riley v. Martin*, 35 Ga. 136; *Keaggy v. Hite*, 12 Ill. 99; *Sturges v. Keith*, 57 Ill. 451; *Tripp v. Grouner*, 60 Ill. 474; *Yater v. Mullen*, 24 Ind. 277; *Cutter v. Fanning*, 2 Ia. 580; *Robinson v. Hurley*, 11 Ia. 410; *Russell v. Huiskamp*, 77 Ia. 727; *Sanders v. Vance*, 7 T. B. Mon. 209; *Freeman v. Luckett*, 2 J. J. Marsh 390; *Daniel v. Holland*, 4 J. J. Marsh 18; *Justice v. Mendell*, 14 B. Mon. 12; *Chamberlain v. Worrell*, 38 La. Ann. 347; *Hayden v. Bartlett*, 35 Me. 203; *Robinson v. Barrows*, 48 Me. 186; *Stirling v. Garritee*, 18 Md. 468; *Hopper v. Haines*, 71 Md. 64; *Beecher v. Denniston*, 13 Gray 354; *Symes v. Oliver*, 13 Mich. 9; *Ripley v. Davis*, 15 Mich. 75; *Allen v. Kinyon*, 41 Mich. 281; *Chase v. Blaisdell*, 4 Minn. 90; *Murphy v. Sherman*, 25 Minn. 196; *Carter v. Feland*, 17 Mo. 383; *Polk v. Allen*, 19 Mo. 467; *Spencer v. Vance*, 57 Mo. 427; *Charles v. St. Louis & I. M. R.R. Co.*, 58 Mo. 458; *Carlyon v. Lannan*, 4 Nev. 156; *Newman v. Kane*, 9 Nev. 234; *Andrews v. Durant*, 18 N. Y. 496; *Griswold v. Haven*, 25 N. Y. 595; *McCormick v. Pennsylvania C. R.R. Co.*, 49 N. Y. 303; *Mechanics' & T. Bank v. Farmers' & M. Nat. Bank*, 60 N. Y. 40; *Whele v. Haviland*, 69 N. Y. 448; *Prince v. Conner*, 69 N. Y. 608; *Cutler v. James Gould Co.*, 43 Hun 516; *King v. Orser*, 4 Duer 431; *Devlin v. Pike*, 5 Daly 85; *Dixon v. Caldwell*, 15 Oh. St. 412; *Hillebrant v. Brewer*, 6 Tex. 45; *Hatcher v. Pelham*, 31 Tex. 201; *Schooler v. Hutchins*, 66 Tex. 324; *Grant v. King*, 14 Vt. 367; *Thrall v. Lathrop*, 30 Vt. 307; *Crumb v. Oaks*, 38 Vt. 566; *Tenney v. Bank of Wisconsin*, 20 Wis. 152; *Ingram v. Rankin*, 47 Wis. 406; *Rankin v. Mitchell*, 1 Han. 495. If the conversion of part of an article renders the rest worthless for all purposes, the value of the whole may be recovered. *Walker v. Johnson*, 28 Minn. 147.

the conversion generally deprives the owner of the property, it does not necessarily do so. The property may, on return by the wrong-doer, be accepted. In that case, of course, the measure of damages is not the whole value of the property, but compensation for the injury done to the property,^(a) which would usually be interest on the value of the property while it was withheld from the plaintiff ^(b) together with the deterioration in its market value.^(c)

So where the defendant withheld possession of a certificate of stock belonging to the plaintiff, the court held that since that act could not deprive the plaintiff of his property in the stock the measure of damages was not the value of the stock.^(d) Where the plaintiff's stock in trade was seized upon an execution which afterward proved void, and after several days he bought it back by paying the amount of the execution and costs, the measure of damages was held to be, first, the expense of securing the goods, which would include the costs and counsel fees included in the execution ; second, the depreciation in value of the goods during detention ; and third, interest on the value of the goods during detention, or at the plaintiff's option the value of his business during the time he was deprived of his stock in trade.^(e)

§ 495. **Value, how determined.**—The value recovered is usually the market value, not the cost of production.^(f) Where goods were wrongfully sold on execution,

^(a) *Williams v. Crum*, 27 Ala. 468.

^(b) *Kinnear v. Robinson*, 2 Han. 73.

^(c) *Renfro v. Hughes*, 69 Ala. 581 ; *Davenport v. Ledger*, 80 Ill. 574 ; *Lucas v. Trumbull*, 15 Gray 306 ; *Carter v. Roland*, 53 Tex. 540 ; *Kinnear v. Robinson*, 2 Han. 73.

^(d) *Daggett v. Davis*, 53 Mich. 35.

^(e) *Anderson v. Sloane*, 72 Wis. 566.

^(f) *Gunn v. Burghart*, 47 N. Y. Super. Ct. 370.

it was held that the price obtained at the auction sale was competent evidence of their value.^(*) In an early case,¹ Abbott, C. J., said that the plaintiff was not *bound* by the sum at which goods were sold by the defendant at auction, "but where the plaintiff is an assignee, who must have sold the goods if they had come to his hands before any sale by the sheriff, it *often happens that a jury considers* the sum at which the goods were actually sold at auction, as a fair measure of damages." Where the goods are contained in a number of packages the value is not what could be obtained on a sale of the entire number of packages, but the aggregate market value of the separate packages at the time.^(b)

§ 496. Value, where to be estimated.—It seems to have been held by the New York Court of Appeals, that the value of foreign goods in an action of trover should be ascertained by the custom-house valuation of them in this country, if made nearly at the time of the conversion.^(c) The Supreme Court of Massachusetts sustained the refusal of the judge at *Nisi Prius* to qualify the rule by limiting the inquiry to the *place* of conversion. It might have been impossible to find that the property had any marketable value at the precise spot where the conversion took place, or in its immediate vicinity.^(d) Where the plaintiffs, lumber dealers doing business at Troy, bought lumber to be sold in their lumber-yard there, in an action for its conversion, it was held error to charge that if the lumber was to be taken to Troy to

¹ *Whitehouse v. Atkinson*, 3 C. & P. 344.

(*) *Heinmuller v. Abbott*, 34 N. Y. Super. Ct. 228.

(b) *Miller v. Jannett*, 63 Tex. 82.

(c) *Caffe v. Bertrand*, 1 How. App. 224.

(d) *Selkirk v. Cobb*, 13 Gray 313. As to the admissibility of evidence of the market price at other places, see *Tiffany v. Lord*, 65 N. Y. 310; *Boylston Ins. Co. v. Davis*, 70 N. C. 485.

be sold there, the plaintiffs were entitled to recover the value at Troy, less the expenses of transportation.^(a) As a general rule, the value of the property is to be taken at the place of conversion.^(b)

§ 497. *Value, when to be estimated.*—Upon general principles, the value of the property at the time of the conversion should be the measure of damages, and that is the rule generally adopted.^(c) If the conversion is established by a demand and refusal, the value should be estimated at the time of the refusal.^(d)

Where the defendants, holding certain bonds of the plaintiff's as security for a loan void for usury, sold them first at auction where they purchased them themselves, and subsequently resold them at private sale, the private sale was held to be the conversion, and the value at that time was held to furnish the measure of damages.^(e) And where property attached on mesne process remains in the plaintiff's possession until judgment and execution in the attachment suit, the measure of his damages is the value of the property at the time it was taken on execution, with interest.^(f) Where bonds of the plaintiff were stolen from the defendant by its negligence, the measure of damages is the value of the bonds at the time of the theft, not at the time of a demand by the plaintiff.^(g) So, where an officer had wrongfully taken

(a) *Spicer v. Waters*, 65 Barb. 227.

(b) *Hamer v. Hathaway*, 33 Cal. 117.

(c) *France v. Gaudet*, L. R. 6 Q. B. 199; *Falk v. Fletcher*, 18 C. B. N. S. 403; *Sedgwick v. Place*, 12 Blatch. 163; *Arrowsmith v. Gordon*, 3 La. Ann. 105; *Greeley v. Stilson*, 27 Mich. 153; *Norwood v. Cobb*, 37 Tex. 141.

(d) *Dows v. National Exchange Bank*, 91 U. S. 618; *Northern Transportation Co. v. Sellick*, 52 Ill. 249.

(e) *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308.

(f) *Henshaw v. Bank of Bellows Falls*, 10 Gray 568.

(g) *Third National Bank v. Boyd*, 44 Md. 47.

from the plaintiff a promissory note, the maker of which was then solvent, but who became insolvent before the officer offered to return it, the measure of damages was held to be the value of the note at the time of the conversion, and interest.^(*)

§ 498. **Natural increase.**—The natural increase of the property accruing before the conversion belongs to the owner, and he may recover compensation for the loss of it,^(b) but he has no claim for increase after the conversion. Thus, where mares were converted, it was said by the Court of Common Pleas of Upper Canada: "If they had been in foal at the time of their wrongful conversion, that would form an ingredient in the estimate of their value, but it would not give the plaintiff a right to recover independently for foals dropped after the conversion of the mares."^(c)

§ 499. **Property increased in value by the defendant.**—Where the property has been increased in value by the defendant, and the plaintiff attempts to get the benefit of the increase, the decisions are in conflict; some cases allowing recovery of the value of the property at the time it was taken, others allowing recovery of the full value. In the simplest case, the defendant has expended labor upon personal property after he got it into his possession. In this case, if the plaintiff has not lost his title to the property, the plaintiff will often be allowed to follow the property and recover it. But by bringing the action of trover he demands damages for the conversion. By the conversion he was deprived of the property, and a claim for the value of it took its place; consequently, that value at the time of conversion, with interest, should be

(*) *King v. Ham*, 6 All. 298.

(b) *Arkansas V. L. & C. Co. v. Mann*, 130 U. S. 69.

(c) *Draper, C. J.*, in *Scott v. McAlpine*, 6 Up. Can. C. P. 302, 306.

the limit of his recovery. It should make no difference that the plaintiff by another form of action might perhaps have obtained the property itself; having the choice, he chose to bring trover, and his damages must be measured by the principles applying to that action, if, as in this case, they afford full and equitable compensation. Nor should it make any difference in this action that the conversion was wilful, and the labor was bestowed upon the property with full knowledge of the facts.

This appears to be the principle generally adopted in the cases. Thus where goods were sent to a dyer,¹ who dyed them, and then insisted on a right to retain them, not only for the charges on them, but for a debt due for dyeing other goods, the Court of King's Bench held that he had no lien but for the price of dyeing the particular goods, and the plaintiff recovered; but the report adds: "The price of dyeing was deducted at the time of taking the verdict, the value of the goods in white being only thereby given to the plaintiff." And the principle of this decision has been followed in Massachusetts, in a case where the plaintiffs made a conditional sale of brown cotton goods to a printing company, who, after printing them, transferred them to the defendant, but did not comply with the conditions; and it was held that the plaintiffs could recover in trover, but the court was of opinion "that the plaintiffs were not entitled to recover the full value of the goods in the printed state." The value of them in their brown state was taken as a more just and equitable measure of damages, under all the circumstances of the case.² So where the plaintiffs

¹ *Green v. Farmer*, 4 Burr. 2214.

² *Dresser Manuf. Co. v. Waterston*, 3 Met. 9. In Alabama, where wood had been converted and made into coal by the defendant, the owner was held entitled to bring trover for the coal. As to the question we are now consider-

ing, it was said: "It is possible the jury might consider the value of the defendant's labor on the rough material"; but as this point had not been presented, it was not decided. *Riddle v. Driver*, 12 Ala. 590.

contracted with R. to build a ship for them, and made advances from time to time in respect of her ; and R. gave them, as security for the advances, a bill of sale of the ship, which stated that he thereby did sell, transfer, etc., to the plaintiffs a certain ship in process of building (describing her), to have and to hold the ship, etc., to the plaintiffs forever, when she should be completed ; the defendant having converted the vessel before she was finished, and having finished her, the plaintiffs were held entitled to recover as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor as special damage the value of freight which the plaintiffs might have earned with her if R. had completed her and delivered her to them. (*) Where the defendant took the plaintiff's logs at one place and transported them to another, the measure of damages is the value of the logs where they were taken. (b) So where the plaintiff's logs were sawed into boards by the defendant, the measure of damages should be the value of the logs, not of the boards. (c) Where yarn was converted by the defendant during the process of manufacture, the measure of damages was the value of the yarn, not the value of the finished product. (d) In-

(*) Reid v. Fairbanks, 13 C. B. 692.

(b) Beede v. Lamprey, 64 N. H. 510; Hill v. Canfield, 56 Pa. 454; Tilden v. Johnson, 52 Vt. 628. So of ore: Omaha & G. S. & R. Co. v. Tabor, 13 Col. 41.

(c) Morton v. McDowell, 7 Up. Can. Q. B. 338. But *contra*, Eastman v. Harris, 4 La. Ann. 193 (*semble*); Baker v. Wheeler, 8 Wend. 505; Rice v. Hollenbeck, 19 Barb. 664; where the taking seems not to have been in good faith. And in Stuart v. Phelps, 39 Ia. 14, where standing corn was wilfully converted, the defendant was obliged to pay its value *after he had husked and cribbed it*. These cases seem to have been influenced by the rule in the case of severance from the realty, *infra*.

(d) Aborn v. Mason, 14 Blatch. 405. The market value of the yarn as such was not given, but the value of the cloth less the cost of finishing it; that is, the value of the yarn *on the frames* as it was at the time of conversion.

deed, it is difficult to see what other rule could be adopted consistently with the general principles of compensation. It has been seen that where compensation is recovered for the entire loss of property no consequential damages can usually be recovered ; and in cases of fluctuating value, as we shall presently see, the better opinion is that the law only allows the value at the time of the conversion. The rule should apply equally in this case ; and the value at the time of conversion, with interest, should be the limit of recovery. Any other rule would give the plaintiff more than compensation for his loss, which was a loss of the chattel unchanged by the labor of the defendant.

It may be claimed for the plaintiff that he has a right to say at what time the conversion took place ; and that he may therefore allege a conversion after the labor of the defendant had been expended upon the property. Thus in *Final v. Backus*,^(*) where the plaintiff's logs were taken to a distant mill and there made into boards, it was held that the plaintiff could elect to treat nothing as a conversion until the logs were cut into boards, and the value of the logs at the mill was held to be the measure of damages. This supposed principle is based on the right of the plaintiff to retake his property by means of an action of replevin at any time until its form was so changed as to divest him of his title. But this right of the plaintiff should not change the measure of damages ; for the principles upon which damages are given are quite distinct from the principles governing the protection of property. When the property is taken from the plaintiff by the tort, its place is taken by a right to compensation of equal value. If after that the plaintiff by accretion or otherwise becomes entitled to claim his

(*) 18 Mich. 218 ; *acc. Everson v. Seller*, 105 Ind. 266.
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property as enhanced in value by the results of the defendant's labor, that fact does not affect the right to compensation for the conversion, a right which accrued before the labor was performed.^(*) Indeed, even in an action of replevin the rule seems to be that the innocent trespasser is to be allowed compensation for his labor.^(b)

§ 500. **Severance from the freehold.**—Where the property is severed from the freehold the conversion takes place after the labor has been expended upon the property, and the value of the property at the time of its conversion includes the labor. The amount of recovery in an action of trover would therefore seem at first sight to be the value of the property after the labor has been expended upon it.

There are, however, certain facts to be considered which tend to modify the general rule in this case. In the first place, this rule results in the recovery of a greater amount than actual compensation, for the owner is enabled to secure the whole benefit of the defendant's labor. In the second place, although the defendant's wrongful act was in reality a trespass upon real estate, the plaintiff recovers a greater amount than the damage to the realty, and a greater amount than he could recover in an action of trespass, unless indeed (as is the case in a few jurisdictions) he is allowed to recover in the action of trespass the full amount the technical rule would give him

(*) See to this effect, *Gates v. Rifle Boom Co.*, 70 Mich. 309.

(b) § 534. The case of *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332, seems at first sight opposed to this view; there the plaintiff carried the defendant's wood to the landing, where the defendant took possession of it; and the plaintiff was refused compensation for his labor in an action of trover. But there is in that case an important distinction, that is, the defendant could not get his wood, to which he had a right, without availing himself of the plaintiff's labor.

in an action of trover.^(*) Still further, where the distinction between the forms of action is abolished, as is very generally the case, and the plaintiff recovers upon the case stated in his pleadings, since he could gain no advantage from the form of action, he should clearly be entitled only to actual compensation, though he alleged a conversion. As we shall see, the result of these considerations has been a great conflict of authority.

§ 501. **The rule in England.**—The rule which was at first adopted in England allowed the plaintiff in all cases to recover the value of the property at the time of the conversion, that is, after it was severed from the soil. In a case in the English Exchequer,¹ the circumstances were as follows: The plaintiff and the defendant were adjoining proprietors in a coal district. The defendant had worked his coal mine under the plaintiff's land, to an extent exceeding a rood, unintentionally, as is to be inferred, the contrary not being alleged, and had brought up a considerable quantity of coal. Trespass being brought, the defendant supposed the rule of damages to be the value of the coal in the bed, or its market value, less the price of getting it out, and paid into court the sum of £133. But Parke, B., who tried the cause, said that the plaintiff would have been entitled in an action of *trover* to the value of the coal as a chattel, either at the pit's mouth, or on the canal bank, if the plaintiff had demanded it at either place, and the defendant had converted it, without allowing the defendant anything for having worked and brought it there; that not having made such a demand, and this action being trespass, he

¹ *Martin v. Porter*, 5 M. & W. 352.

(*) For the rule in an action of trespass *quare clausum*, see the chapter on Injuries to Real Property.

was entitled to the value of the coal as a chattel at the time when the defendant began to take it away, that is, as soon as it existed as a chattel, which value would be the sale-price at the pit's mouth, after deducting the expenses of carrying the coals from the place in the mine, where they were got, to the pit's mouth. And the jury, adopting the above principle, fixed the value of the coal, when got, at £251 9s. 6d. Leave was given to reduce the verdict (if the court should be of opinion that the proper measure of damages was the value of the coal in the bed, which the jury estimated at £159) to an amount equal to the difference between this sum and the £133, paid in by the defendant. But the rule was refused, the court thus affirming the principle laid down at the trial. Lord Abinger said: "It may seem a hardship that the plaintiff should make this extra profit of the coal; but still, the rule of law must prevail." And the doctrine of this case was recognized in the Queen's Bench.¹ But in a case at Nisi Prius, where a similar trespass was complained of, Parke, B., told the jury that if there was fraud or negligence on the part of the defendant, they might give as damages under one of the counts, which was in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*. But if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coal fields had been purchased from the plaintiff; which latter estimate was adopted by the jury.² This conflict of opinion continued for some time.^(*) but

¹ *Morgan v. Powell*, 3 Q. B. 278.

² *Wood v. Morewood*, 3 Q. B. 440 n.

(*) See *Hilton v. Woods*, L. R. 4 Eq. 432; *Llynvi Co. v. Brogden*, L. R. 11 Eq. 188.

the rule laid down by Baron Parke in *Wood v. Morewood* was finally adopted in Chancery,^(*) and by the House of Lords in the case of *Livingstone v. Rawyards Coal Co.*,^(b) a Scotch appeal. In that case Lord Blackburn said :

“ I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrong-doer—many things which you would properly allow in favor of an innocent, mistaken trespasser would be disallowed as against a wilful and intentional trespasser, on the ground that he must not qualify his own wrong, and various things of that sort. But in such a case as the present, where it is agreed that the defenders, without any fault whatever on their part, have innocently, and, being ignorant, with as little negligence or carelessness as possible, taken this coal, believing it to be their own, when in fact it belonged to the pursuer, then comes the question,—how are we to get at the sum of money which will compensate them ?

“ Now, my lords, there was a technical rule in the English courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land ; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owners of the fee were to be paid the value

(*) *Jegon v. Vivian*, L. R. 6 Ch. 742.

(b) 5 App. Cas. 25, 39.

of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrong-doer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do.

"Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say ; but a long while ago (and when I say a long while I mean twenty-five years ago) Mr. Baron Parke put this qualification on it, as far as I am aware for the first time. He said ; if, however, the wrong-doer has taken it perfectly innocently and ignorantly, without any negligence, and so forth, and if the jury in estimating the damages, are convinced of that, then you should consider the mischief that has been really done to the plaintiff, who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrong-doer had bought it whilst it was yet a portion of the land as you would buy a coal-field.^(*) That was the rule to be applied when it was an innocent person that did the wrong. That rule was followed in the case of *Jegon v. Vivian*,^(b) which has been much mentioned ; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrong-doing the point that is to be made out for the damages is, as was expressed in the minutes of the decree : 'The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district'; that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil."

§ 502. **Technical rule, followed in some jurisdictions.**—The technical rule, allowing recovery of the whole value of the property after its severance, was at first followed in this country. So in New York,¹ where certain logs

¹ *Brown v. Sax*, 7 Cow. 95.

(*) *Wood v. Morewood*, 3 Q. B. 440 n.

(b) L. R. 6 Ch. 742.

had been cut on the plaintiff's land, drawn to the defendant's mill, and converted into boards (the value of the logs being \$187.56; of the boards, \$309.46, and the difference, \$121.90); and the judge charged that the measure of damages would be the value of the boards without reference to the price of the defendant's labor, and the jury gave \$309.46. It was insisted, on a motion for a new trial, that in trover, where the conversion was the gist of the action, and the character of the original taking not inquired into, the damages should be confined to the value of the thing as taken, or the value of the defendant's labor deducted; and that even if the rule laid down at the trial were sound in *trespass*, it could not apply here, because the plaintiff had elected to bring trover. The court held otherwise, on the authority of previous cases. But Sutherland, J., dissented. He admitted that where the taking was *wilful and tortious*, this rule would not be oppressive or unjust. But that as the mode of taking could not, in trover, be inquired into, no such general rule could be laid down. He put the case of jewels lodged with a banker for safe custody, and pawned by him, and set at great expense by the pawnee; could the rightful owner in trover against the pawnee obtain the jewels as set, without deduction for the labor of setting? But a new trial was denied.

This rule has been followed in several jurisdictions in this country. So it is held, in the case of coal wrongfully mined, that the measure of damages is the value of the coal at the pit's mouth, less the expense of bringing it there, but allowing nothing for the expense of mining;(*)

(*) *Cheaney v. Nebraska & C. S. Co.*, 41 Fed. Rep. 740; *McLean C. C. Co. v. Long*, 81 Ill. 359; *McLean C. C. Co. v. Lennon*, 91 Ill. 561; and in *trespass*, *Illinois & St. L. R.R. Co. v. Ogle*, 82 Ill. 627; *Franklin C. Co. v.*

and in the case of timber wrongfully cut, that the measure of damages is the value of the logs just after they are felled.^(*) So in Indiana it was held in an action for the conversion of wheat, of which the defendant had forcibly taken possession, as it stood in his field, that proof of the value of the defendant's labor in harvesting and threshing the crop, for the purpose of reducing the damages, had been erroneously admitted.^(b) In *Winchester v. Craig*,^(c) an action for the conversion of timber, by cutting it by mistake from the land of the plaintiff, it was said that the jury could fix the measure of damages either at the value when taken, together with profits that might have been derived in the ordinary market, or the market value at the place where it was tortiously sold by the defendant, less his expenses in the transportation and preparation for sale, with interest from the date of the conversion. In some jurisdictions the rule is held to be different according to the form of action; the plaintiff in trover being allowed the whole value of the property, as increased by the defendant's labor, while in trespass he is confined to the damage done to the realty.^(d)

§ 503. Defendant generally allowed value of his labor.— But by the prevailing view the defendant, if he acted

McMillan, 49 Md. 549; *Blaen Avon C. Co. v. McCulloh*, 59 Md. 403. The amount to be deducted from the value at the pit's mouth is not what the defendant spent in getting it there, but what it would have cost the plaintiff. *In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46.

(*) *Bly v. U. S.*, 4 Dillon 464; *Skinner v. Pinney*, 19 Fla. 42; *Moody v. Whitney*, 38 Me. 174; *Winchester v. Craig*, 33 Mich. 205; *Beede v. Lamprey*, 64 N. H. 510; and in trespass, *Smith v. Gonder*, 22 Ga. 353; *Bennett v. Thompson*, 13 Ired. L. 146; *Firmin v. Firmin*, 9 Hun 571.

(b) *Ellis v. Wire*, 33 Ind. 127.

(c) 33 Mich. 205.

(d) *Omaha & G. S. & R. Co. v. Tabor*, 13 Col. 41; *Skinner v. Pinney*, 19 Fla. 42; *Foote v. Merrill*, 54 N. H. 490.

in good faith, is allowed the value of his labor ; that is, the measure of damages is the value of the property as it was just before the defendant's wrong-doing began.

The leading case upon the subject in this country is *Forsyth v. Wells*,^(*) which was decided before the present rule was established in England. That case was an action of trover for mining and carrying away coal from the plaintiff's lands. On the trial, the Court of Common Pleas, having decided against the argument of the defendant that trover would lie, held further that the measure of the plaintiff's damages was not simply the value of the coal in the ground, but its value after it had been "dug," or what was called "knocked down," the difference having been about as one to eight. On error the Supreme Court agreed that the action was properly brought, since the defendant below, as it appeared, had not claimed a line which would include the coal taken out, but had gone beyond the proper limit by mistake. But the court sent the case back for a new trial, on the ground that the measure of damages should have been the same as in trespass for mesne profits, and that if, as the jury appeared to have found, the defendant below had been guilty of no intentional wrong, he ought to have been charged, not with the value of the coal after he had been at the expense of mining it, but only with its value in place, and with such other damage to the land "as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits." The learned chief-justice, in delivering the opinion of the court, discusses the rule of damages as affected by the form of the action as follows :

"The plaintiff insists that because the action is allowed for the coal as personal property—that is, after it had been mined

(*) 41 Pa. 291, 294.

or severed from the realty—therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined ; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do, and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones ; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice, for it is continually applied to every form of wrongful conversion and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but, also, for outrage and malice in the taking and detention of them.^(a) Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus.^(b) And so does trespass.^(c) In very strict form trespass is the proper remedy for a wrongful taking of personal property and for cutting timber, or quarrying stone or digging coal on another man's land and carrying it away ; and yet the trespass may be waived and trover maintained without giving up any claim for any outrage or violence in the act of taking.^(d) It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us

(^a) Citing *Dennis v. Barber*, 6 S. & R. 420, 426; *Berry v. Vantries*, 12 S. & R. 89, 93; *Taylor v. Morgan*, 3 Watts 333.

(^b) Citing *M'Donald v. Scaife*, 11 Pa. 381.

(^c) Citing *Morrison v. Robinson*, 31 Pa. 456.

(^d) Citing *Moore v. Shenk*, 3 Pa. St. 13.

any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough.^(*) When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy ; but the law allows the waiver of the taking, so that the party may sue in trover, and this is often convenient. Sometimes it is even necessary, because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation, but only to give him a more convenient form for recovering that much. Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries, and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of *Silbury v. McCoon*^(*) warn us to be careful how we express ourselves on that subject. We do find cases of *trespass* where judges have adopted a mode of calculating damages for taking coal, that is substantially equivalent to the rule laid down by the Common Pleas in this case, even where no wilful wrong was done unless the taking of the coal out by the plaintiff's entry was regarded as such. But, even then, we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation.^(*) . . . Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either

(*) Citing *McNair v. Compton*, 35 Pa. 23, 28.

(*) 4 Denio 332 ; 3 N. Y. 379.

(*) Citing *Martin v. Porter*, 5 M. & W. 352 ; *Morgan v. Powell*, 3 Q. B. 283 ; *Salmon v. Horwitz*, 28 Eng. L. & Eq. 175.

refuses the action of trover for the new article, or limits the recovery to the value of the original article.^(*) Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies ; and so long as we bear this in mind we shall have but little difficulty in managing the forms of actions so as to secure a fair result."

This case is generally followed. So in trover for wrongfully mining coal, the measure of damages is the value of the coal *in situ* ;^(b) for cutting trees, the value of the trees standing,^(c) often measured by the difference in value of the land before and after cutting.^(d) But this applies only when the defendant's trespass was in good faith. Where he knowingly converted property severed from the plaintiff's land, there can be no allowance for the expense of severing it.^(e) Where a railroad company rightfully made a cut through the plaintiff's land, thereby excavating coal, and wrongfully sold the coal, the measure of damages was the value of the coal at the time of the sale.^(f) This differs from the cases just considered. Technically, there was no wrong-doing till the sale, consequently compensation must be estimated at that time. As a matter of justice, the labor should not be deducted

(*) Citing *Silisbury v. McCoon*, 6 Hill 425, and note ; *Hyde v. Cookson*, 21 Barb. 92 ; *Swift v. Barnum*, 23 Conn. 523 ; *Moody v. Whitney*, 38 Me. 174.

(b) *Goller v. Fett*, 30 Cal. 481 ; *Chamberlain v. Collinson*, 45 Ia. 429 ; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80 ; *Waters v. Stevenson*, 13 Nev. 157 ; *Coal Creek M. & M. Co. v. Moses*, 15 Lea 300.

(c) *Thompson v. Moiles*, 46 Mich. 42 ; *Gates v. Rifle Boom Co.*, 70 Mich. 309 ; *Ayres v. Hubbard*, 71 Mich. 594 ; *Whitney v. Huntington*, 37 Minn. 197 ; *King v. Merriman*, 38 Minn. 47 ; *Heard v. James*, 49 Miss. 236 (*semble*) ; *Ward v. Carson R. W. Co.*, 13 Nev. 44 ; *Foot v. Merrill*, 54 N. H. 490 ; *Whitbeck v. New York C. R.R. Co.*, 36 Barb. 644 ; *Ross v. Scott*, 15 Lea 479 ; *Tilden v. Johnson*, 52 Vt. 628.

(d) *Chipman v. Hibberd*, 6 Cal. 162.

(e) *Cheaney v. Nebraska & C. S. Co.*, 41 Fed. Rep. 740.

(f) *Lyon v. Gormley*, 53 Pa. 261.

from the recovery because it was performed by the defendant for his own benefit, in making the cut.

§ 504. *Sale by wanton trespasser.* — Where a wanton trespasser severs property from the soil and sells it to the defendant, the measure of damages is the whole value of the property at the time of the sale. In *Smith v. Baechler* ^(a) this rule was applied in the case of a purchaser with knowledge of the trespass, but the court intimated that the rule would be otherwise in the case of an innocent purchaser; and in other cases it has been held that where the trespass was *bona fide* only the damage to the land could be recovered; ^(b) but the weight of authority is that the rule should be applied in all cases, irrespective of the good faith of the defendant himself. ^(c) In *Tuttle v. White* ^(d) the court said:

“A person in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser, or one who has no title and can give none, he must suffer the loss or look to his vendor. To hold otherwise would be to give the trespassers the benefit of their own wrong, contrary to all the authorities. If these defendants had only made a partial payment for the logs under their contract of purchase, and the plaintiff herein was limited in his recovery to the value of the logs when first severed from the land, then defendants would be the gainers; they would have the benefit of the trespasser's labor, and yet the latter could not maintain an action to recover the amount thereof, or the balance of the contract price. The conversion by these defendants took place when they first took charge or control over these logs in Black Creek, and they should respond in damages according to

^(a) 18 Ont. 293.

^(b) *Hoxsie v. Empire L. Co.*, 41 Minn. 548 (*semble*); *Railway Co. v. Hutchins*, 32 Oh. St. 571.

^(c) *Woodenware Co. v. United States*, 106 U. S. 432; *United States v. Hielner*, 11 Sawy. 406; *Parker v. Waycross & F. R.R. Co.*, 81 Ga. 387; *Tuttle v. White*, 46 Mich. 485; *Tuttle v. Wilson*, 52 Wis. 643.

^(d) 46 Mich. 485, 487.

the value at that time. The same reasons do not exist in this case to protect these defendants that did in *Winchester v. Craig* ^(a) and *Wetherbee v. Green*. ^(b)

"There are very many cases where the value of the timber standing, or when first severed from the soil, would be but nominal, and to give wilful trespassers, or those to whom they may sell, the benefit of any increased value put upon it by the original wrong-doer, and confine the owner to the nominal value, would but encourage the commission of acts of trespass, and tend to make purchasers at least careless as to the title they were acquiring. It is easy for any one to claim that he has purchased property in entire good faith, and very difficult in many cases to establish the contrary, and if one claiming to be such is protected to the extent of the increased value he may have in good faith added to the property, this is all he can fairly claim under the law. This rule in effect was held in *Isle Royale Mining Co. v. Hertin*, ^(c) and much that was there said is equally applicable in the present case."

§ 505. *Confusion*.—* The action of trover, as well as that of trespass, often presents interesting questions connected with what is technically termed confusion.¹ "If," says Blackstone,² "one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, our law to guard against fraud gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain without his own consent." ^(d)**

In Maine this doctrine of confusion of goods has been

¹ Confusion, Lat. *Confusio*. *Confundi dicitur, quod aliis ita commiscetur ut deduci et se parari non possit, aut certe difficilis sit ejus separatio. Vicat. Vocab. Utriusque Juris in voc.* The

term is applied also to the merger of different interests, and in this sense the analogous word is used in the French law.—*Crivelli, in voc.*

² 2 Comm., ch. 26, p. 405.

^(a) 33 Mich. 207.

^(b) 22 Mich. 311.

^(c) 37 Mich. 332.

^(d) *Anon.*, Popham, 38 pl. 2; *Warde v. Aeyre*, 2 Bulst. 323. See *Stephenson v. Little*, 10 Mich. 433.

applied to a case where the defendant had taken the plaintiff's logs, and manufactured them into boards, and intermixed these boards with a pile of his own, so that they could not be distinguished, with the *fraudulent* intent of depriving the plaintiff of his property. And it was held that the owner of the logs might maintain replevin for the whole pile.¹ If, however, the mixture be accidental or not wrongfully made, each party will be entitled to his own property or to its value, provided the separation can be made, or the values be apportionable. If by the intermixture the property be destroyed, the loss falls on him whose fault occasioned the destruction.^(*)

* The civil law does not in any case appear to recognize the severe rule of our system : *Quod si frumentum Titii frumento tuo mistum fuerit, siquidem voluntate vestra, commune est, quia singula corpora, id est, singula grana, quæ cujusque propria fuerint, consensu vestro communicata sunt. Quod si casu id mistum fuerit, vel Titius id miscuerit sine tua voluntate, non videtur commune esse, quia singula corpora in sua substantia durant. Sed nec magis, istis casibus, commune sit frumentum quam grex intelligitur esse communis, si pecora Titii tuis pecoribus mista fuerint.*¹ Nor should the analogous case in regard to real property be overlooked. In trespass for mesne profits, the *bona fide* occupant of lands without notice, who has improved them, is allowed to set off or recoup the value of his improvements.^{**} Why should not the same equity be extended to this case? Whenever the

¹ Wingate v. Smith, 20 Me. 287.

² Inst. lib. ii, tit. i, § 28. A different rule necessarily prevailed where separation was impossible. *Sed et id quod in charta mea scribitur aut in tabula*

pinxitur, statim meum fit; licet de pictura quidam contra senserint propter pretium pictura; sed necesse est ei rei cedi quod sine illa esse non potest. Dig. lib. vi, De Rei Vindi, p. 23, § 3.

(*) Ryder v. Hathaway, 21 Pick. 298.

question is distinctly presented, the milder rule will probably be maintained.

§ 506. **Consequential damages.**—It has been intimated that special damages may be recovered in this action for the detention of the property, over and above its value. It was suggested¹ by Parke, B., at *Nisi Prius*, that the plaintiff could recover special damages if laid in the declaration; as in trover for the conversion of a horse, that the plaintiff could recover for money paid for the hire of other horses. And it has been so since decided by the Queen's Bench, in trover brought by a carpenter for his tools; the declaration containing an allegation, that by reason of the conversion the plaintiff was prevented from working at his trade.² In this country, however, it seems doubtful; the doubt resulting from the technical form of the action, as well as from the question as to remoteness or consequentiality of damages.³ (*) The only modification that can be said to exist of this rule is, perhaps, in those cases where intermediate the conversion and the return of the property claimed, special damage has been sustained by the plaintiff; and in such cases the special damage demanded must be distinctly alleged in the declaration.⁴

The case of *Bodley v. Reynolds* was followed in *Reilly v. McMinn*.^(b) This was an action for the conversion of a blacksmith's tools; the blacksmith being unable to

¹ *Davis v. Oswell*, 7 C. & P. 804.

² *Bodley v. Reynolds*, 8 Q. B. 779.

³ See *Brizsee v. Maybee*, 21 Wend. 144; and in Pennsylvania, see *Farmers' Bank v. McKee*, 2 Pa. St. 318.

⁴ *Moon v. Raphael*, 2 Bing. N. C. 310; *Tindall, C. J.*, said: "The injury

of which the plaintiffs complain not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action of trover, ought at least to have formed the subject of a special allegation."

(*) So, in Connecticut, they are not allowed. *Hurd v. Hubbell*, 26 Conn. 389; *Seymour v. Ives*, 46 Conn. 109; see *Saunders v. Brosius*, 52 Mo. 50.

(b) 2 Pugs. 370.

procure other tools, owing to his remote situation, was thrown out of employment. It was held that the jury might consider this in addition to the value of the tools. So in *Shotwell v. Wendover*,^(*) the court said the plaintiff has a right to claim damages for the use of the articles (tools, etc.), and for their deterioration while in the possession of the defendant. In *Stollenwerck v. Thacher* ^(b) it appeared that the plaintiffs had sent certain goods to G. for sale. G. was to receive a certain commission on the sales. G. sold them to the defendant without requiring cash payment, as he had been ordered to do. In trover against the vendee, it was held that the damages should not include a commission to G. for the sale, because the plaintiff was not obliged to allow G. a commission for doing an act which was not shown to have been for the interest or according to the intent of the plaintiffs. In *Leffingwell v. Gilchrist*,^(c) an action for the conversion of a file of the newspaper of which the plaintiff was editor, evidence of the inconvenience an editor would suffer from the destruction of a file of his newspaper was excluded. In *France v. Gaudet* ^(d) it appeared that the plaintiff had bought champagne at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave England. The defendant, at whose wharf the wine was lying, refused to deliver it, and the plaintiff could not fulfil the contract, there being no other champagne in the market of the same quality. It was held that the plaintiff was entitled to recover the price at which he had sold the champagne. Mellor, J., in delivering the opinion of the court, and in reference to the argument of the defendant's counsel, that "in analogy to the cases of special damages arising out of the

(*) 1 Johns. 65.

(b) 115 Mass. 224.

(c) 40 Ia. 416.

(d) L. R. 6 Q. B. 199, 204

breach of contract, notice of the special circumstances ought to have been given to the defendants, in order to entitle the plaintiff to recover anything beyond the ordinary value of the goods converted," used the following language :

"We are not prepared to say that there is any analogy between the case of contract alluded to, in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract, special damages reasonably resulting from the breach of it may be considered within the contemplation of the parties. In case of trover, it is not in general special damage which can be recovered, but a special value attached by special circumstances to the article converted ; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined ; no notice to the wrong-doer could then *affect the value*, although it might affect his conduct ; but upon what principle is a notice necessary to a man who *ex hypothesi* is a wrong-doer ? In such a case as the present, the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from their rightful owner, who thereby sustains 'an actual present loss,' which appears to us to be a convertible term with 'actual value.'"

CHAPTER XV.

RULE OF HIGHER INTERMEDIATE VALUE.

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| <p>§ 507. Higher intermediate value.
508. English cases.
509. New York cases.
510. <i>Baker v. Drake</i>.
511. <i>Wright v. Bank of the Metropolis</i>.
512. Result of the New York cases.
513. Cases in the Supreme Court of the United States.
514. Pennsylvania.
515. Alabama.
516. Florida, Arkansas, Mississippi, California.
517. Other States following the rule of higher intermediate value.</p> | <p>§ 518. New Hampshire.
519. Other jurisdictions following the general rule.
520. The New York rule unsatisfactory.
521. Contract to carry stock.
522. Rule of avoidable consequences inapplicable.
523. Consequences of the New York rule.
524. Contract to hold for a rise in the market.
525. Result of following the property.</p> |
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§ 507. **Higher intermediate value.**—It has been held by many courts of high authority that in actions for the actual conversion, not only of stock, but of any personal property of fluctuating value, the measure of the damages is the highest market price which the property may have had from the date of the conversion to the end of the trial, provided the action be brought and pressed with due diligence. The same rule is also applied by these courts in other actions, namely, in actions of detinue and replevin, in actions for refusal to transfer or to deliver stock in corporations, and in actions for refusal by the vendor to deliver goods, the price of which has been paid in advance. It is impossible to consider the application of this rule in actions for conversion apart from its application in other forms of action. The rule will therefore here be discussed generally.

§ 508. **English cases.**—The early English cases can hardly be said to have established any definite rule. The leading case¹ was on a writ of inquiry to assess damages on a bond given by the defendant, conditioned to replace, on the 1st of August, 1799, a quantity of stock lent him by the testator. The only question was whether the damages should be calculated at the price of the stock on the 1st of August, or at the price on the day of trial; and the latter sum was held the true rule of damages. Grose, J., said: "The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement." It was objected to this rule by counsel that it gave the plaintiff the power either by hastening or delaying his suit to take advantage of the rise in the market, without any risk in case of a fall. And Lawrence, J., said: "Suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time, would not a court of equity compel the party to replace it at the then price of the stock, if the market had risen in the meantime?"

But in a later case in the Court of Exchequer,² * the defendants, in 1833, agreed to sell and deliver, on board the plaintiff's vessel, a certain quantity of Odessa linseed, at that place, at 30s. per quarter. The plaintiff's vessel arrived at Odessa, and they paid the defendants £1,575 in October, 1833, being a moiety of the purchase-money of the expected cargo. The defendants gave notice that they could not comply with the contract. In February, 1834, when the cargo would have arrived in England if it had been delivered to the plaintiffs at Odessa, the price was from 47s. to 50s. per quarter; at the time of trial it would have been about 56s. The defendants paid into

¹ *Shepherd v. Johnson*, 2 East. 211. ² *Startup v. Cortazzi*, 2 C. M. & R. 165.

court, in September, 1835, £2,072, which was at the rate of 47s., and which was paid over to the plaintiffs, who contended that, as they had paid a portion of the purchase-money and lain out of it for a long time, they were entitled to damages according to the price at which the seed was selling at the time of the trial. Lord Abinger, at the trial, charged : " That in his opinion the plaintiffs were not entitled to treat this as a case resembling contracts for the replacing of stock where the damages are estimated at the price of the funds, and they were not entitled to damages according to the then price of the seed, and that taking the price at the time the cargo would arrive, it appeared to him that enough had been paid into court ; but with these observations he left the case to the jury for their deliberation," who, designing, as Lord Abinger remarked, to give no more than the *money advanced and interest on it*, found a verdict for the defendants. A motion was made for a new trial, on the ground of misdirection ; but the rule was discharged.

Lord Abinger, C. B., said :

" The plaintiffs did not prove that they wanted this seed for any particular purpose, or that they sustained any peculiar injury from its non-delivery. I told the jury that neither the witnesses nor the plaintiffs had pointed out any precise line which should mark the proper estimate of the damages; for they had not stated what they had intended to do with the seed, whether to crush it or to sell it. The plaintiffs, however, insisted that they were entitled to the profits which they might possibly have made upon it, if it had been delivered. The jury appeared to me to wish to give no more than the money advanced and interest upon it. I am not aware of any rule for estimating damages for speculative profits besides taking the interest on the money advanced. It was not proved that the plaintiffs could have made more than 5 *per cent.* on that money, or that they had not credit at their bankers to that extent, and thereby had sustained any peculiar inconvenience. The money had been paid into the

court, and the plaintiffs received it as soon as the practice of the court allowed them so to do. I felt a difficulty as to how the damages ought to be computed ; but one of the witnesses gave something like a rule, which I pointed out to the jury. He said that *Odessa* linseed was about the same quality as *Sicilian* linseed, though it usually sold at a somewhat lower rate. The ship arrived in England in March. He stated that at that time *Sicilian* linseed was well sold at 50s., and that he himself had furnished good seed at that price ; and deducting 2s. for the difference in value, the fair price of the *Odessa* seed was 48s. ; and allowing a discount, the price would have been about that which the defendant has paid into court. It is to be remarked, that, by the terms of the contract, supposing the cargo to have been shipped in pursuance of it, the plaintiffs would have been obliged to pay the residue of the purchase-money at that time. I did not, however, prescribe any line to the jury upon which they ought to proceed ; but I told them they ought not to give speculative or vindictive damages."

Alderson, B., said :

"The only question in the case was as to the amount of damages. The contract was to deliver a certain quantity of linseed at a certain time, namely, on the arrival of the ship in London. Previously to that period, a notice was given by the defendant that he was unable to perform his contract. It appears that the price at that time was not the proper criterion for estimating the damages ; for, as the plaintiffs had already parted with their money, they were not then in a situation to purchase other seed. The more correct criterion is the price at the time when the cargo would have arrived in due course, according to the contract ; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is to consider the loss of the gain which the party would have made if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained, arises from their having been kept out of their money. That is a matter to be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of court. It appears from the report of the trial that there were no circumstances submitted to the jury to show

that the plaintiffs had sustained any special damage. The verdict is, therefore, in my opinion, right."

In another case,¹ of a bond to retransfer stock, the same principle was laid down. It was contended for the plaintiff, that he was entitled, at his option, to the best of three prices: either the value of the stock on the day fixed for the transfer; or, secondly, the price at the day of trial; or, thirdly, the highest price which the stock had borne between the day of delivery and the day of trial. But the court held, on the particular circumstances of the case, that the third claim could not be sustained. It seems difficult, however, in reason, to say why, if the plaintiff is entitled to a subsequent rise, provided it maintain itself to the day of trial, he should be prejudiced by a fall that may be due only to the delays of litigation.

Two later decisions in the English books held substantially the same doctrine. In an action on a bond conditioned to replace stock at a particular day, the defendant not having replaced it, Lord Ellenborough held, at *Nisi Prius*, that the plaintiff was entitled to claim according to the value upon the day of the trial.² In an action on a bond to replace stock, Best, C. J., at *Nisi Prius*, held that the price of the stock should be taken as at the time of the trial, saying:

"When the defendant had the money, he promised to restore the stock. Justice is not done if he does not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is, that the defendant has effectually prevented him from doing so."³

The subject was again examined, and the rule adhered to in *Owen v. Routh*.⁴

¹ *M'Arthur v. Seaforth*, 2 Taunt. 257.

² *Downes v. Back*, 1 Stark. 318.

³ *Harrison v. Harrison*, 1 C. & P. 412.

⁴ 14 C. B. 327.

In a case of detinue for railway shares, the plaintiff demanded the shares on the 17th May, 1845, when they were worth £3 5s. per share, and they were not delivered till the 25th of November of the same year, when they had fallen to £1. The measure of damages was held to be the difference between these two sums.¹ **

These cases left the English law in an unsettled state; and it seems still to remain undetermined.^(*) It is, however, beyond doubt that in actions for non-delivery of corporate stock the value at the time of trial may be recovered.^(b) But in an action against a corporation for refusal to transfer stock on its books, the measure of damages is the value of the stock at the time it should have been transferred, with interest.^(c) The distinction, if any there is, between these cases is a very unsatisfactory one. In actions for the conversion of chattels of a fluctuating value the general rule seems to be established, and the value at the time of conversion is the measure.^(d)

§ 509. **New York cases.**—The question has been elaborately considered in New York. The leading case adopting the rule of higher intermediate value is *Romaine v. Van Allen*,^(*) an action for the wrongful conversion of railway shares pledged with the defendant as collateral security for a loan. In this case, which was decided in 1863, Mr. Justice Rosekrans, delivering the opinion

¹ *Williams v. Archer*, 5 C. B. 318; *Archer v. Williams*, 2 Car. & Kir. 26.

(*) *Mayne on Damages*, 4th ed., pp. 179, 364.

(b) *Ibid.*, p. 179; *Owen v. Routh*, 14 C. B. 327.

(c) *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584.

(d) *Mercer v. Jones*, 3 Camp. 477; *Loder v. Kekulé*, 3 C. B. N. S. 128. But *contra*, *Greening v. Wilkinson*, 1 C. & P. 625.

(*) 26 N. Y. 309, 311, 315. The rule had already been adopted in the case of failure to deliver goods paid for in advance, without much consideration: *Cortelyou v. Lansing*, 2 Cai. Cas. 200; *West v. Wentworth*, 3 Cow. 82; *Wilson v. Mathews*, 24 Barb. 295.

of the court, said : " Independent of the authorities, the rule appears to me to be reasonable and necessary to protect the rights of the owners and pledgors of stock against the tortious acts of pledgees, if the plaintiff commences his action within a reasonable time after conversion, and prosecutes it with reasonable diligence." The reasoning, however, on which the decision is based, applies broadly to all cases of the conversion of chattels, the learned justice using the following language : " Although the general rule of damages in trover may be the value of the chattel at the time of its conversion, with interest, or that value when the chattel has a determinate or fixed value, yet, when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at some period subsequent to the conversion ; and the necessary result of all the decisions, in my judgment, is that in such cases the plaintiff is entitled to recover the highest market value of the property at any time intermediate the conversion and the trial." In the case of *Brass v. Worth*,^(*) a somewhat different rule was applied. This was also an action for the conversion, by a wrongful sale, of stock which, by special arrangement of the parties, had been purchased, and, as was adjudged, should have been held by the defendant for the plaintiff's account. The measure of damages was held to be in reference to certain stock, its value on the day when the plaintiff demanded a return of it, and in reference to certain other stock, which had not been demanded, the difference between its market value on a certain day, which was " a reasonable time after the sale, and the cost price of the defendant's purchase thereof, with the interest." But the case of *Romaine v. Van Allen* was adhered

(*) 40 Barb. 648.

to by the court of last resort in *Burt v. Dutcher*,^(*) which was an action for the conversion of hops, and was followed by the Supreme Court of the State, in an action for the conversion of grain.^(b) The same rule was also applied, by the Superior Court of the city of New York, to the case of a railroad bond lent by the plaintiff to the defendant, by whom it was converted to his own use.^(c) The main question now before us was again very fully considered by the New York Court of Appeals, in an action by a principal against his factor, for the conversion of wheat by a sale, in violation of instructions.^(d) In this case the plaintiff, who resided in Cleveland, Ohio, having certain wheat in the defendants' store at Buffalo, on the 12th day of July, 1853, telegraphed to the defendants at that city to sell it the same day at \$1.08 a bushel, and if it were not sold on that day, to ship it to New York. The defendants accordingly offered the wheat the same day to a person who desired to be allowed until the following morning to inspect it and decide on the purchase. To this the defendants assented, provided no news were received in the meantime affecting the value, and at eight o'clock the next morning he took the wheat at the price named. The case having been tried by the court without a jury, the sale was found to have been in good faith, but not having been made on the day to which the defendants were limited by their instructions, was adjudged a conversion of the wheat by them. The court fixed the 29th of November, in the same year, as the time within which the plaintiff might reasonably have brought the

(*) 34 N. Y. 493.

(b) *Morgan v. Gregg*, 46 Barb. 183; *acc. Lawrence v. Maxwell*, 6 Lans. 469.

(c) *Nauman v. Caldwell*, 2 Sweeney 212.

(d) *Scott v. Rogers*, 31 N. Y. 676, 681; 4 Abb. App. 157.

action. In the Court of Appeals the case was twice argued. On the first argument the court was equally divided. On a reargument before a court differently constituted, the four judges who opposed the severer rule being no longer on the bench, the following conclusions were adopted in an opinion delivered in September, 1864. Hogeboom, J., said :

“In the absence of any definite means for ascertaining the period when the owner of the property would have disposed of it, we are necessarily more or less in the dark as to the amount of injury which he has sustained by the illegal act of the defendants, and are driven to resort more or less to conjecture, or to fix upon some arbitrary period for determining the price of the property. It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach, for the commencement of this action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be, to allow to the plaintiff some reasonable period, within the statute of limitations, for fixing the price of the property, provided he notifies the adverse party *at the time* of such act on his part ; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of commencing the action, provided the action be commenced within a reasonable time after the conversion. . . . This seems to me the just and equitable rule. It is not, however, perhaps quite the rule which has obtained in the law for settling the question of damages in the case of an illegal conversion of property. . . . I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to wit : to allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time ;

and as between these two periods, the time of commencing the suit and the time of trial, the rule is somewhat fluctuating. What this reasonable time shall be has never been definitely settled, and may, perhaps, fluctuate to some extent, according to the circumstances of the particular case. In the case at bar, it was held to be four months after the conversion, which terminated before the close of navigation in that year; which latter circumstance might perhaps be supposed to have some probable influence in raising the market price of the property in New York, and therefore as not unlikely to induce the plaintiff to retain the property until that time. I think the adjudications allow at least so much latitude in cases similarly circumstanced. For reasons before stated, the limit of time is necessarily, to some extent, arbitrary, for the want of available means to determine when the plaintiff would have sold his property, and, by consequence, the damages he has sustained. But it has been supposed, and I think reasonably, that a liberal allowance of time should be made in favor of the plaintiff, and against the defendant, inasmuch as the latter is the defaulting party."

The judge then compared the rule in trover to that in the case of an executory sale, where the plaintiff had paid the price in advance, and held the two cases to be analogous. He said that in the case of a sale, the highest value between the breach of contract and the commencement of an action, or of the trial of one brought within a reasonable time thereafter, was allowed on the ground that it might be impossible, and was certainly unjust, for the plaintiff to pay the price a second time, in order to procure a similar article to that of which he has been deprived; he held that the same reasoning applied to the action of trover, and that the only difficulty lay in fixing the period when the value of the property should be estimated. He added:

"Even if the evidence is satisfactory that the plaintiff intended to retain the property, I do not think that he should be permitted to roam through the entire period between the conversion and the time when the statute of limitations would attach, for the

purpose of discovering the highest price at which the property sold in market. This gives to the transaction the color of a mere speculation, and not of a just ascertainment of damages actually sustained."

The rule in this case allows the plaintiff to fix his own damages after a retrospect of the market since the conversion, by selecting the highest market rate of the property during that time, provided within a reasonable time after the conversion he, by bringing the action or otherwise, gives the defendant notice of the day thus selected. But the court simply approved the measure adopted in that case by the judge before whom it was tried, as not unreasonable in itself and not unjust to the defendant. They considered that they could not say that four months after the time when the wheat, if duly forwarded, would have reached its destination, was, as matter of law, an unreasonable time for bringing the suit, and that, on questions of fact, they had no power to review the finding of the judge. But the decision did not reverse the still wider rule previously adopted in the case of *Romaine v. Van Allen*. That rule, in the later case of *Burt v. Dutcher*, was, as has been seen, reaffirmed by the same court. The latter case, as we have observed, was an action for the conversion of merchandise; and in the former, as we have also noticed, the court does not proceed upon the ground of any distinction between stocks and other personal property, in the application of the rule.

In the case of *Suydam v. Jenkins* (*) the English cases giving the value of stock at the time of trial were justified on the ground, "first, that as chancery may decree a specific execution of a contract for replacing stock, and the defendant, when such a decree is made, to enable himself to perform it, must, of necessity, purchase the

(*) 3 Sandf. 614, 633, an action of replevin.

stock at its then market price, he can have no right to complain when he is compelled to pay the same sum as damages, by the judgment of a court of law; and, second, that as stock is usually held not for sale, but as a permanent investment, it is a reasonable presumption that had it not been replaced at the stipulated time, the plaintiff would have retained its possession until the day of trial, and hence its price at that time, whatever it might be, is no more than an indemnity." (*) The objections to the

(*) These are, doubtless, the reasons commonly assigned for the distinction. But it may be observed that it is more than questionable whether a decree can be had for the specific performance of an agreement for the delivery of shares in the public funds, or such other stocks as, from their well-known and permanent character, are usually sought for investment. Breaches of such contracts are readily compensated in damages, and are not, therefore, the subject of equitable relief. Story Eq. Jur. §§ 717, 717a; *Buxton v. Lister*, 3 Atk. 383; *Sullivan v. Tuck*, 1 Md. Ch. Decisions, 59. And in regard to such stocks as are of fluctuating value, the presumption may be quite as applicable to them as to any other property, that they were bought for speculative purposes rather than to hold for investment. In *Romaine v. Van Allen* the stock between the time of the conversion and the beginning of the trial rose from \$3,937.50, which was its full market price on the day of the conversion, to \$5,962.50 before trial began. The trial, which was before a referee, was a protracted one, and during its progress the stock happened to rise in the market to the price of \$8,175, which was the highest reached before the trial ended, and was the amount allowed. Here we have this remarkable result of the application of the rule adopted, that from the circumstance that the trial was had before a referee, instead of the court, or a court and jury, the plaintiff gained upwards of \$2,000 in the amount of the judgment. It is difficult to see how the principle of compensation could justify this windfall. Again, if the action were brought in the city of New York, where the courts are often oppressed with business, it might be that the suit, although prosecuted with proper diligence, could not be tried within a much longer time than if it were in a contiguous county. On the principle of this case, the verdict for the same conversion, although obtained with proper diligence, might be double if the suit were brought in one county what it would be in another, where the same obstacles to an immediate or speedy trial did not exist. Another serious objection to the rule is, that the reason of it does not apply where the goods were purchased for use, or for some other purpose than for sale, nor even when they were bought for sale, unless the advance occurred within the period during which they

general application of the rule were, however, stated in a masterly manner by Duer, J., in his celebrated opinion in this case : (*)

“Our objections to considering an intermediate higher value as an invariable rule of damages, have already been stated, and need not be repeated. It is perfectly just, when the enhanced price has been realized by the wrong-doer, or it is reasonable to believe would have been realized by the owner, had he retained the possession ; but, in all other cases, damages founded upon such an estimate, are either purely speculative, or plainly vindictive. They are conjectural and speculative, when it is barely possible that the owner, had he retained the possession, would have derived a benefit from the higher value. They are vindictive, when it is certain that no such benefit could have resulted to him.”

would have been sold in the ordinary course of business. In the case in which the rule is least objectionable, that of goods intended for sale, indemnity would require that it be confined to such as were or may be presumed to have been meant for sale indefinitely in point of time. Where goods were to have been sold either immediately or within a certain fixed period, the range of the plaintiff's right of selection should, on the same principle, be narrowed to the time of the intended sale. So in the case of property which from its nature would have perished, or in the case of articles intended for consumption which would have been consumed within a limited period, the time of the fluctuation of the market, within which the price is to be determined, ought not on any principle of compensation to go beyond such period. In each case, the facts and circumstances showing what would have been the probable disposition of the property by the owner, should seem material in showing his actual loss, and, therefore, in ascertaining the proper indemnity. It is grossly inequitable that the owner should have the advantage of a chance rise in value, which it is certain he had never contemplated, and would not have taken advantage of had the property remained in his possession. The want of uniformity in the rule, and the numerous exceptions which must be grafted on it, seem grave objections. If the plain and definite rule of the value at the time of conversion should in any case be enlarged, that modification of it laid down in the case of *Suydam v. Jenkins*, 3 Sandf. 614, *supra*, by which damages beyond the value of the property and interest are allowed only where they are proved, and not merely presumed, to have been sustained, is the most satisfactory which has been suggested. See *Mestke v. Van Doren*, 16 Wis. 319.

(*) P. 629.

In *Markham v. Jaudon*,^(*) an action for the conversion of stock, it was held by the Court of Appeals that the plaintiff could recover the highest value between the time of the conversion and the time of the trial; that is, the "fluctuating rule" laid down in *Romaine v. Van Allen* was adopted. Grover and Woodruff, JJ., however, dissenting. The same rule was adopted by the Commission of Appeals of New York, in *Lobdell v. Stowell*.^(b) The present Court of Appeals has, however, taken a different view, and both these decisions are overruled. In *Matthews v. Coe*,^(c) which was an action to recover for an alleged conversion of warehouse receipts of corn, pledged by the plaintiff's assignor as security for advances made by the defendant, decided by that court in March, 1872, it appeared that the defendant had acted in good faith, and moreover that the plaintiff had intended to sell the corn at a dollar a bushel. The price, however, allowed by the referee before whom the action was tried, was fixed by him at the market rate prevailing a year and a half after the action was brought, which was a dollar and forty-five cents a bushel. Church, C. J., delivering the opinion of the court, observed that whatever might be the propriety of a rule giving the plaintiff the benefit of the highest market price between the conversion and the trial, in a case not exceptional in its circumstances, such a rule could have no application to one like that before the court. The learned chief judge closed with the significant intimation that the rule referred to was not so firmly settled as to be beyond the reach of review whenever necessary.

§ 510. *Baker v. Drake*.—Such a necessity arose in an action decided by the same court in September, 1873, concerning a speculation in stocks like that in *Markham*

(*) 41 N. Y. 235.

(b) 51 N. Y. 70.

(c) 49 N. Y. 57.

v. Jaudon, and in which the precise questions there presented were again raised.^(*) In this case the plaintiff had advanced but \$4,240 on account of the purchase of various railway shares, which, in November, 1868, had cost the defendants upwards of \$66,300 beyond the plaintiff's advances. In that month the shares, at a sale of them made by the defendants in good faith, but without authority, at the market rates, to pay their advances, produced less than \$67,000. Between this time and that of the trial the stock fluctuated heavily, and in August, 1870, rose in the market to 170, which was its culminating point, and from which it declined. The jury, instructed in accordance with the rule in *Markham v. Jaudon*, found a verdict for the plaintiff of \$18,000, which was the difference between the average price, at which the defendant sold, and 170. This was held error on appeal to the Court of Appeals, where it was said that the proper rule in such a case, was the market price of the stock within a reasonable time after the plaintiff received notice of the conversion. *Rapallo, J.*, in a very learned opinion, said that the supposition that a plaintiff who had failed to keep his margin good up to the sale, would have continued to supply it during the time necessary to carry the stock to its highest point, and then have been fortunate enough to sell it at that precise point, was an unreasonable one, and that the award of a measure of damages based on such a conjecture was a wide departure from that rule of simple indemnity which should control the damages, except in cases where punitive damages are allowable. The learned judge then pointed out, that as he had not paid for his stocks, and did not hold them as an investment, the loss, if any, which he sustained was simply that of the chance of their subsequent

(*) *Baker v. Drake*, 53 N. Y. 211, 217.

rise in the market, and this chance was accompanied by the corresponding one of their decline, and, also, by the further contingency in case of a rise of his not availing himself of it. He added :

“A continuation of the speculation also required him to supply further margin, and involved a risk of ultimate loss. If, upon becoming informed of the sale, he desired further to prosecute the adventure, and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed, or refused to do this, his remedy was to do it himself, and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock, from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale? Would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period?”

Under the rule in *Markham v. Jaudon*, as he proceeded to show, the plaintiff is “in a position incomparably superior to that of which he has been deprived.” It leaves him relieved both from risk and from the necessity of supplying “margin,” “with his venture out for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end.” Meanwhile, obstacles and delays in the progress of the suit are for the interest of the suitor, since they extend the period for his retrospective selection of the rate of his own damages. He pointed out that the reasoning of those decisions which sanction the rule of a higher intermediate value, being founded on the idea that the plaintiff, having been wrongfully deprived of his property or the price agreed to be paid for it, cannot be justly expected to pro-

cure it a second time, is necessarily inapplicable to the case of property purchased for speculation, not with his funds, but the defendant's. It is to be noticed that, in this decision, the usual rule in trover, viz., the value of the goods at the time of the conversion, was not adopted, the court proceeding on the theory that the plaintiff should have a reasonable time to replace himself in the market, after notice of the wrong. The rule laid down as the proper one, by Rapallo, J., in this case, was distinctly affirmed in a second appeal taken in the above case.^(*) It appeared that, at the second trial, the judge charged the jury that the plaintiffs were entitled to recover as damages what it would have cost them to replace the stocks on a day within a reasonable time after the sale, deducting the sum due to the defendants, and the recovery was based upon the market value of the stock, on a day between the sale and the commencement of the action. This was held to be correct.

§ 511. *Wright v. Bank of the Metropolis*.—The case of *Baker v. Drake* was approved, and the rule laid down by Rapallo, J., extended, in the later case of *Wright v. Bank of the Metropolis*,^(b) an action for the wrongful sale of pledged stock. In that case Peckham, J., said :

“In such a case as this, whether the action sounds in tort or is based altogether upon contract, the rule of damages is the same. . . . There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is

(*) *Baker v. Drake*, 66 N. Y. 518.

(b) 110 N. Y. 237, 246.

the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial, would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation, for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall be only such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

"It is said that, as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damages as light as he reasonably may, rests upon him in both cases, for there is no more legal wrong done by the defendant in selling the stock, which the plaintiff has fully paid for, than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in

the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time, does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial, and the price at that time there might be some degree of propriety in awarding under certain circumstances, if it were higher than when it was converted. But to presume, in favor of an investor, that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming of course, in all cases, that there was good faith on the part of the defendant.

"It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law."

§ 512. Result of the New York cases.—The result of the New York cases is that the rule of the highest intermediate value is applied in stock transactions, but in a very limited form; the highest value being allowed only

between the time of injury and the time when the plaintiff by due diligence might have replaced himself in the market. This restriction of the rule has been brought about by the application of the principle of avoidable consequences to a rule which seems not to have been approved by the court on principle, but was too firmly established by authority to be set aside.

§ 513. **Cases in the Supreme Court of the United States.**—The question has been considered by the Supreme Court of the United States. Where a contract was made¹ to redeliver to the plaintiffs flour left with the defendants and not paid for, the plaintiff claimed damages only at the rate of the price of flour on the day fixed for delivery; and though the case went up to Washington, nothing was decided.

In an action brought in Louisiana,² by petition or libel, the forms of action of the English law being there unknown, on a contract for the delivery of cotton at 10 cents per pound, on or before the 15th day of February, when the article was 12 cents per pound, it appeared that it had risen to 30 cents before the suit was brought; the plaintiffs insisted that they were entitled to the highest market price up to the rendition of the judgment. But the unanimous opinion of the court was, "that the price of the article at the time it was to be delivered was the measure of damages." Marshall, C. J., said: "For myself only, I can say that I should not think the rule would apply *to a case where advances of money* had been made by the purchaser under the contract. But I am not aware what would be the opinion of the court in such a case."

The New York rule, so far at least as stock transac-

¹ *Douglass v. McAllister*, 3 Cranch 298.

² *Shepherd v. Hampton*, 3 Wheat. 200, 204.

tions are concerned, has been adopted by the Supreme Court of the United States. In *Galigher v. Jones*,^(*) Bradley, J., said :

“ It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time ; and hence with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the States in this country, whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. . . . It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.”

§ 514. *Pennsylvania*.—In Pennsylvania the rule of the highest intermediate value is not applied in actions

(*) 129 U. S. 193, 200.

for the non-delivery of chattels generally, though the price has been paid in advance,^(a) nor in actions for the conversion of personal property.^(b) In the case of the conversion of stock, the general rule is to some extent modified. Where the consideration for the stock has been paid, its highest market value between the breach and the trial, together with the bonus and dividends received in the meantime, is the rule ; where the consideration has not been paid, the plaintiff is allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock.^(c) The general rule in trover is said not to apply "where the article could not be obtained elsewhere, or where from restrictions on its production or other causes its price is necessarily subject to very considerable fluctuations." In the case of bank stock which is within this exception, the ordinary rule would hold out temptations to acts of wrongful conversion, by making them profitable to the wrong-doer, since the bank or any other trustee might deprive the owner of the very advantage he had in view when he made the investment. So, in an action to replace borrowed stock, where the value of the stock was highest at the time of the trial, that value was held the proper measure of damages.^(d) But the principle of these decisions applies only to the case of a refusal to perform the contract, whereby the plaintiff suffers the loss in the advance of the price of the stock.^(e) In *Neiler v. Kelley* ^(f)

(a) *Smethurst v. Woolston*, 5 W. & S. 106.

(b) *Neiler v. Kelley*, 69 Pa. 403.

(c) *Bank of Montgomery v. Reese*, 26 Pa. 143.

(d) *Musgrave v. Beckendorff*, 53 Pa. 310.

(e) *Phillips' Appeal*, 68 Pa. 130.

(f) 69 Pa. 403, 408.

Sharswood, J., said that in cases of trover for stock the ordinary rule,

"is not changed, but only modified to this extent, that wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial. The grounds of this exception are that such securities are limited in quantity—are not always to be obtained at any price, and are of very fluctuating value. These are supposed to constitute sufficient reasons for the distinction,"—

and it has finally been held that the rule in Pennsylvania does not apply to ordinary stock contracts, but only to trusts, and cases where justice could not be reached by the ordinary measure of damages.^(*) In a case where a plaintiff, who had paid for stock, formally tendered it back to the defendant, and demanded the return of the money, or the defendant's note for the amount, pursuant to one of the terms of sale, the measure of damages was held to be the amount paid, and not the market price at the time of the refusal.^(b)

§ 515. *Alabama*.—In Alabama the latest cases hold it proper to give evidence of the highest value between the time of the conversion and that of the trial, and it is in the discretion of the jury to give the value they judge proper between this highest value and the value at the time of conversion with lawful interest from that time.^(c) In *Burks v. Hubbard*^(d) the court said: "This discretion of the jury in selecting the exact period of valuation should

(*) *Work v. Bennett*, 70 Pa. 484; *Huntingdon & B. T. R.R. & C. Co. v. English*, 86 Pa. 247; *North v. Phillips*, 89 Pa. 250.

(b) *Laubach v. Laubach*, 73 Pa. 387.

(c) *Loeb v. Flash*, 65 Ala. 526; *Street v. Nelson*, 67 Ala. 504; *Renfro v. Hughes*, 69 Ala. 581. The rule in Wyoming seems to be the same. *Hilliard Flume Co. v. Woods*, 1 Wyo. 396.

(d) 69 Ala. 379, 384.

be exercised in such a manner as to prevent the defendant from reaping pecuniary profit through his wrongful act, and at the same time, in proper cases, to permit the special equities or hardships of the particular case so to operate in the mitigation of damages as exact justice may require."

§ 516. **Florida, Arkansas, Mississippi, California.**—In Florida the rule of the highest market value was approved by the court, in *Moody v. Caulk*,^(*) as the proper one in the case of stock held for investment, of rare pictures, jewels, and like articles, provided the jury be satisfied that the plaintiff would have held the property up to the time of the advance. In *Peterson v. Gresham*,^(b) the rule in Arkansas was said to be "in cases where there is an increase in value after the taking and before the demand, suit, or actual conversion," the highest market value during this time; but it was said, when the property was actually converted and passed beyond the possible reach of the plaintiff, then, in trover, its value and the interest is the fixed measure of damages.

In Mississippi,^(c) the Court of Errors and Appeals, while rejecting the fluctuating rule, maintained the following exceptions to the fixed rule of the value and interest: First, where the original act was wrongful; second, where it was *bona fide*, but the defendants subsequently disposed of the property wrongfully, and with knowledge of the plaintiff's claim; third, where the taking and disposition of the property were both in good faith, but the defendant seeks to retain the excess of the proceeds of the sale over the market value at the time of the conversion "as a speculation"; and

(*) 14 Fla. 50.

(b) 25 Ark. 380, 388, *per* Gregg, J.

(c) *Whitfield v. Whitfield*, 40 Miss. 352.

fourth, where the property has some peculiar value to the plaintiff, and is wilfully taken or withheld by the defendant. In the several classes of cases thus excepted by the learned court, the rule of compensation, in its opinion, is abandoned, and the damages are left at large to the jury. The last exception, however, as we think, with deference, might be properly included in the preceding ones.^(*) In California, although the "highest value" rule was for a time adopted,^(b) it was soon said that "some qualification of the rule may be found necessary where there has been an unreasonable delay in bringing suit, or under certain special circumstances."^(c) And in a later case the rule was accordingly seriously modified. In May, 1863, the defendant had wrongfully replevied hay crops, then not worth over \$2,500. The following year, in consequence of a drought, the price of hay rose enormously, and the jury, having been allowed to assess the plaintiff's damages at any market rate prevailing after the conversion, with interest, found a verdict for \$25,763.37. The court, after reviewing the history of the fluctuating rule, say that it is an exceptional one of American origin, and that, if unqualified, it is unjust. Rejecting, however, as illogical and unreasonable the particular qualification of it sometimes adopted as to diligence in bringing and prosecuting the suit, they conclude that, in the class of cases in which it has been applied, the correct measure is the highest market value within what, under the circumstances of each case, is a reasonable time after the property was taken, with interest "from the time when the value was estimated." As the action had not been brought till

(*) *Acc. Bickell v. Colton*, 41 Miss. 368.

(b) *Douglass v. Kraft*, 9 Cal. 562; *acc. Dabovich v. Emeric*, 12 Cal. 171.

(c) *Hamer v. Hatheway*, 33 Cal. 117.

1869, they thought that too wide a range had been allowed the jury, and therefore set aside the verdict.^(a) But soon after this decision a statute was passed^(b) giving the plaintiff in cases of conversion the highest intermediate value, where action is brought with reasonable diligence.

§ 517. *Other States following the rule of higher intermediate value.*—The rule of highest intermediate value between the injury and the time of trial is adhered to in several jurisdictions besides those already examined. It has been adopted in Alabama,^(c) Indiana,^(d) South Carolina,^(e) Texas,^(f) and by statute in Dakota.^(g) In Iowa the highest intermediate value between the injury and the date of bringing the action is allowed.^(h) It is to be observed that in all jurisdictions the plaintiff to obtain the benefit of this rule must bring and prosecute his action with reasonable diligence; and it has been held in Texas that if there is undue delay the measure of damages is the value at the time of the injury.⁽ⁱ⁾

(a) *Page v. Fowler*, 39 Cal. 412.

(b) Cal. Civ. Code, § 3336.

(c) *Conversion*: *Tatum v. Manning*, 9 Ala. 144; *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213. *Delinque*: *Johnson v. Marshall*, 34 Ala. 522. *Contra*, in case of *non-delivery of goods sold*: *Rose v. Bozeman*, 41 Ala. 678. The present rule is, however, different. See § 515.

(d) *Conversion*: *Ellis v. Wire*, 33 Ind. 127. *Non-delivery*: *Kent v. Ginter*, 23 Ind. 1.

(e) *Conversion*: *Kid v. Mitchell*, 1 N. & McC. 334.

(f) *Conversion*: *Stephenson v. Price*, 30 Tex. 715. *Non-delivery*: *Randon v. Barton*, 4 Tex. 289; *Calvit v. McFadden*, 13 Tex. 324; *Brasher v. Davidson*, 31 Tex. 190; *Gregg v. Fitzhugh*, 36 Tex. 127.

(g) Dak. Comp. Laws, § 4603. In *Pickert v. Rugg*, 46 N. W. Rep. 446 (N. D.), Corliss, C. J., said of this statute that "the rule will work out absurd results."

(h) *Conversion*: *Cannon v. Folsom*, 2 Ia. 101. *Non-delivery*: *Davenport v. Wells*, 3 Ia. 242; *Harrison v. Charlton*, 37 Ia. 134; *Myer v. Wheeler*, 65 Ia. 390; *Gilman v. Andrews*, 66 Ia. 116.

(i) *Heilbronner v. Douglass*, 45 Tex. 402.

§ 518. *New Hampshire*.—The rule of highest intermediate value was disapproved in New Hampshire in the important case of *Pinkerton v. Manchester and Lawrence Railroad*,^(*) after a review of the cases, and the value of the articles which should have been delivered at the time of the failure to deliver them, is held to be the just and convenient measure of damages. Bellows, J., said :

“The general rule here and elsewhere is, that in an action on a contract to deliver goods, stocks, and other personal property, the measure of damages is the value of the property at the time and place of delivery. But a distinction has been made in some jurisdictions, by which, where the price has been paid in advance, the plaintiff has been allowed to elect the value at the time when the property ought to have been delivered, or at the time of trial, or, as some cases hold, the value at any intermediate period. Such a distinction has been recognized in England, in New York, and in the courts of some other States in the Union, upon the ground that the seller, having got the money of the plaintiff, the latter may be deprived of the means, by the seller's act, of going into the market and purchasing the same property at the then market prices.”

“There being, then, much conflict in the authorities, the question is to be settled upon principle ; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock. The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach ; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that, in some cases, the plaintiff may have been injured to the extent of the value of the property at the highest market price between the breach and the time of trial. But it is equally true that, in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be delivered entered into the common consumption of the country, in the shape of provisions, perishable

(*) 42 N. H. 424, 457, 461.

or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dyestuffs, etc., to hold that the plaintiff might elect, as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages disproportioned to the injury. For, in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause, by review, new trial, or otherwise. Shall there be a different measure of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and the trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before the trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances of unjust extortion, which no court could contemplate without pain."

This case was followed later in *Frothingham v. Morse*.^(*)

§ 519. Other jurisdictions following the general rule.—The rule of highest intermediate value is disapproved and the general rule, giving the value at the time of the loss, followed in all cases, in most jurisdictions. Such seems to be the rule in Connecticut;^(b) and such is without doubt the rule in the District of Columbia,^(c)

(*) 45 N. H. 545.

(b) *Hurd v. Hubbell*, 26 Conn. 389. *Contra*, in case of non-delivery when the price was paid in advance: *West v. Pritchard*, 19 Conn. 212.

(c) *Non-delivery of stock*: *Tayloe v. Turner*, 2 D. C. (2 Cr. C. C.) 203.

Illinois,^(*) Kentucky,^(b) Louisiana,^(c) Maine,^(d) Maryland,^(e) Massachusetts,^(f) Michigan,^(g) Missouri,^(h) Nevada,^(k) North Carolina,^(l) Ohio,^(m) Tennessee,⁽ⁿ⁾ Vermont,^(o) Wisconsin,^(p) and Ontario.^(q) In Georgia this rule is followed where the conversion is not a continuing one, but begins and ends in a single act, as a sale.^(r)

In a case in Michigan ^(*) Cooley, J., said :

“A party's right of recovery must be deemed fixed at some time, and he cannot wait for an indefinite period and speculate

(*) *Smith v. Dunlap*, 12 Ill. 184 ; *Otter v. Williams*, 21 Ill. 118 ; *Sturges v. Keith*, 57 Ill. 451 ; *Brewster v. Van Liew*, 119 Ill. 554. *Non-delivery of goods sold* : *Cushman v. Hayes*, 46 Ill. 145.

(b) *Sproule v. Ford*, 3 Litt. 25 ; *Lillard v. Whittaker*, 3 Bibb 92.

(c) *Vance v. Tourné*, 13 La. 225.

(d) *Freeman v. Harwood*, 49 Me. 195. *Failure to return borrowed stock* : *McKenney v. Haines*, 63 Me. 74.

(e) *Third Nat. Bank v. Boyd*, 44 Md. 47. *Refusal to transfer stock* : *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269, 306 (*semble*) ; *Baltimore C. P. Ry. Co. v. Sewell*, 35 Md. 238 ; *Andrews v. Clark*, 20 Atl. Rep. 429.

(f) *Conversion* : *Kennedy v. Whitwell*, 4 Pick. 466 ; *Greenfield Bank v. Leavitt*, 17 Pick. 1 ; *Johnson v. Sumner*, 1 Met. 172. *Refusal to issue or transfer stock* : *Gray v. Portland Bank*, 3 Mass. 364, 390 ; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90 ; *Hussey v. Manufacturers' & M. Bank*, 10 Pick. 415 ; *Wyman v. American Powder Co.*, 8 Cush. 168.

(g) *Bates v. Stansell*, 19 Mich. 91 ; *Chadwick v. Butler*, 28 Mich. 349, 352, per Cooley, J. (*semble*) ; *Jackson v. Evans*, 44 Mich. 510.

(h) *Conversion* : *Walker v. Borland*, 21 Mo. 289.

(i) *Conversion* : *O'Meara v. North American M. Co.*, 2 Nev. 112 ; *Boylan v. Huguet*, 8 Nev. 345.

(l) *Conversion* : *Arrington v. Wilmington & W. R.R. Co.*, 6 Jones L. 68, per Ruffin, J. (*semble*).

(m) *Failure to return borrowed stock* : *Fosdick v. Greene*, 27 Oh. St. 484.

(n) *Non-delivery of goods sold* : *Coffman v. Williams*, 4 Heisk. 233, 240.

(o) *Non-delivery* : *Hill v. Smith*, 32 Vt. 433 ; *Copper Co. v. Copper Mining Co.*, 33 Vt. 92.

(p) *Ingram v. Rankin*, 47 Wis. 406, explaining *Weymouth v. Chicago & N. W. Ry. Co.*, 17 Wis. 550 ; *Webster v. Moe*, 35 Wis. 75.

(q) *Refusal to transfer stock* : *McMurrich v. Bond H. H. Co.*, 9 Up. Can. Q. B. 333 (*semble*).

(r) *Dorsett v. Frith*, 25 Ga. 537.

(s) *Chadwick v. Butler*, 28 Mich. 349, 352.

upon the changes in the market while taking upon himself none of the risks of decline. This would put him in a better position than if he had the property in possession ; for then, if he would realize upon it, he must select a particular time for making sale, and accept the price at that time ; while under the rule relied upon he may have the highest price for a series of years by simply postponing the bringing of suit."

§ 520. *The New York rule unsatisfactory.*—With great deference to the authority of the court, we must venture to suggest that the application of the rule of avoidable consequences made by the Court of Appeals of New York, like all other variations from the ordinary rule of the *value* at the time of the act complained of, and which deprives the plaintiff of his property, will be found in practice to be open to objection. It has been already pointed out (*) that the rule of avoidable consequences is a branch of the rule excluding *remote* damages. What the plaintiff would (acting as prudent men usually act) do, on notice of a breach of contract or tort, in order to reduce the loss, the law expects him to do in the ordinary course of things. If he does not take such steps, and the loss is thereby enhanced, this is the result of his own independent volition or negligence, and is only related to the defendant's act as a consequence of that remote class of which the law cannot take cognizance. For instance, in contracts of personal service, the plaintiff earns his living by the work. Hence, it is reasonable to assume that, if thrown out of work by defendant's act, he will reduce the loss as soon as possible by a new contract of service. If he lies by, his subsequent loss of money is the result of his own choice, not of the defendant's act. So, if a roof leaks, it is reasonable to assume that the person whose health and safety are endangered by the leak will repair.

(*) See Chapter VI.

If an owner of a boat seeking freight loses it through defendant's act, it is only natural that he should try to get other freight. And so in a multitude of other cases in which the rule has been applied. But it does not follow that because all contracts are founded on the expectation of benefit of some kind, all parties contracting must be expected on a breach to proceed to replace themselves. Some such erroneous assumption as this underlies the reasoning of the New York courts.

§ 521. *Contract to carry stock.*—The contract which they have had principally in view is the agreement by stock brokers *to carry stock for a customer*. The broker buys for the customer a certain number of shares, against which the customer makes a deposit, called a "margin." The intention of the agreement is that if the stock rises the broker shall, on notice, sell the stock for the customer, the latter getting the benefit of the rise. If it falls, the broker is also entitled to demand, by proper notice, additional margin, and on failure to make the margin good he may sell the stock. The broker is said to carry the stock because he advances the whole purchase-money (except the margin), charging the customer with interest and commissions. In New York a transaction of this kind is held to make the relation between the customer and broker that of pledgor and pledgee; ^(*) and if the broker sells without demand to supply additional margin, or without notice, this amounts to conversion. ^(b) Whatever the nature of the relation is held to be, it is obvious that the object of the agreement is always to secure a profit from a rise in the market value. It is also, in a certain sense, a continuing contract. The broker agrees to carry the stock, not for a definite time, but for an indefinite time, he being not

(*) *Gillett v. Whiting*, 120 N. Y. 402.
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(b) *Ib.*

only pledgee, but selling agent as well, and the stock being left in his hands for sale. Both parties contemplate a sale, either at a profit or at a loss. If an unauthorized sale by the broker is regarded as a conversion, according to the ordinary rule the measure of damages would be simply the value of the stock at the time of the sale; if it is looked upon as a breach of a continuing agreement to carry the stock, and have it ready for the plaintiff if he wishes to sell it, there being no fixed time for performance, and the defendant having put performance wholly out of his power, there is no hardship in charging him with all the profits that might with reasonable certainty have been made within the period during which the contract would have continued. But there is usually no certainty whatever that any profits would have been made, because the contract might at any moment have been brought to an end by the plaintiff himself. Nor is there in the ordinary case any certainty that he would have directed a sale on a rising market. There is consequently no way of proving with that certainty required by the first principles of the law of damages that he would have had anything but the value of the stock at the time and place of conversion.

§ 522. Rule of avoidable consequences inapplicable in such cases.—From this conclusion the New York courts have escaped by applying the rule of avoidable consequences. A prudent man, whose opportunity of profit is lost to him, will, it is said, at once replace himself in the market; in other words, on learning of the conversion he will as soon as possible make a new contract as nearly similar as may be to that which has been broken. Hence it is concluded that his measure of damages will be any advance in the price of the stock from the time of the conversion up to

a reasonable time to replace it.^(a) But on what principle is it his duty to replace it, or is it a proper inference that he will do so? As already stated, the rule does not mean that whenever a contract is broken the law assumes that it is natural to suppose that the party injured will immediately set to work to save the defendant from loss by entering into another contract with a third person as nearly profitable as the first as possible.^(b) Such a requirement would make it necessary on the breach of every contract to inquire into the whole situation and circumstances of the party, in order to ascertain whether he might by perfect prudence have reduced the damages. This is a task not for a court of law, but for omniscience.

§ 523. *Consequences of New York rule.*—The most serious objection to the New York rule is the confusion it threatens to introduce into the proper application of the rule of avoidable consequences. If it is founded, as the Court of Appeals seems to hold, on a general principle, it must be applied generally, as for instance in all cases of sales. Here, then, we should have the rule that in all cases of failure to deliver, the plaintiff's damages are measured by the market value—not at the time and place of delivery, but at a reasonable time after the breach for him to replace himself. The question of reasonable time, whether a question of law or fact, must be decided upon all the facts in the case. It must depend, as we have just said, on such questions as whether the plaintiff has parted with his money, how much money or credit he has left, what steps it is necessary for him to take to procure credit, etc., etc. If applied in the case of contracts at large, the question of reasonable time becomes

^(a) *Baker v. Drake*, 53 N. Y. 211.

^(b) *Ill. Cent. R.R. Co. v. Cobb*, 64 Ill. 128; *Wilcox v. Campbell*, 106 N. Y. 325; *Wolf v. Studebaker*, 65 Pa. 459; see §§ 208, 219.

still wider. What is a reasonable time, for example, for one who is having a house built for him, to replace himself in the market? Nor can the question of reasonableness be confined to the single element of time. It is a question which underlies the whole doctrine of avoidable consequences, and whenever courts attempt to apply the doctrine, they will be forced to discuss it in every aspect. Was it reasonable that the plaintiff should replace himself at all? We have seen already^(*) that the rule does not require impossibilities. If he *could not* have replaced himself, he will be excused. So also,^(b) if excessive expenditure was required. Such questions as these can hardly be escaped if the New York rule represents a general principle, and they would introduce great confusion into many branches of the law.

The present New York rule applied to contracts to carry stock, is, we believe, erroneous, and founded on a wrong principle; but it does little harm if confined to these cases. Any universal application of the principle on which it is supposed to be founded, to contracts and torts generally, would be productive of serious confusion, and do much to imperil the existence of all the fixed rules of compensation which represent the body of the existing law of damages. For instance, there is no difference in principle between articles of fluctuating value and any other chattels. In fact, all articles of commerce fluctuate more or less in value. If, therefore, the New York rule is properly applied in stock transactions, it is, as we have just said, applicable in all cases of sales, and the measure of damages for failure to deliver a chattel would not be, as it is, the difference between the market and the contract price at the time and place of delivery, but the difference within a reasonable time after breach for the

(*) § 219.

(b) § 218.

plaintiff to replace himself. The doctrine of replacement is often spoken of in sales, because the cost of replacing at the time and place of breach represents the actual value of the lost bargain ; but wherever the question is *res integra*, it may well be questioned whether on breach of a speculative stock contract (we take this as the extreme case, and the one for which the fluctuating rule was introduced), the law should regard it as the natural course of a prudent man to at once enter into a second contract of the same sort. But even if it does, what he has actually lost is the value of the stock at the time of breach or notice, and not the wholly uncertain profit which no retrospective examination of the markets will ever assure us he would have made.

§ 524. *Contract to hold for a rise in the market.*—We have just seen that when a conversion is committed by a broker, selling the plaintiff's stock prematurely, the act may be not only a tort, but also the breach of a continuing contract. Upon principles that will be considered in a later chapter, the measure of damages for breach of such a contract would be regulated by the value of the stock at the time of performance. But that is usually a period that is not capable of being definitely fixed, and therefore, as has just been seen, any amount greater than the value of the stock at the time of sale would not be susceptible of definite proof.

In certain cases, however, the required certainty of proof may be obtained, and in such a case the higher value should be allowed. If, for instance, the broker had directions to sell at a certain price, and that price was reached after the wrongful sale, but before notice to the plaintiff, he should recover damages measured by the value of the stock at that price. If the broker was to hold until ordered to sell, and the plaintiff, after the sale,

but before notice of it, gave orders to sell, the value of the stock at the time such orders were given should be taken as the measure of damages. If no orders were given by the plaintiff until after notice of the sale, it is certain that he would have held the stock for a reasonable time after the time at which he had notice of the sale; long enough, at least, for him to send selling orders to the broker and for such orders to be carried out. And though it is impossible to prove that he would have sold at that time, it is certain that *he would have had the stock* then; and since, through breach of the broker's contract, he did not have it, he would seem entitled to the value of it at that time. But this would be *not a reasonable time to replace himself, but a reasonable time to give notice of the time for performance*. This reasoning applies not only to brokers, but to factors, and other agents who hold the property of their principals with power of sale. Accordingly where a factor sells property contrary to his instructions he may, in a proper action, be held liable for the highest market value for a reasonable time after the sale.^(*) This principle was approved in a case in North Carolina.^(b) In that case a carrier was directed to deliver the plaintiff's goods to a certain factor of his who had instructions as to the sale of the goods. The carrier misdelivered the goods to another factor of the plaintiff, who having no instructions sold the goods. It was held that the same measure of damages should be adopted that would apply in the case of a wrongful sale by the factor to whom the goods were to be delivered; and this was the difference between the price obtained and the highest market price of the goods

(*) *Loraine v. Cartwright*, 3 Wash. C. C. 151; *Maynard v. Pease*, 99 Mass. 555; *Milbank v. Dennistoun*, 21 N. Y. 386.

(b) *Arrington v. Wilmington & W. R.R. Co.*, 6 Jones L. 68.

between the time of the sale and the receipt of notice by the plaintiff.

§ 525. Result of following the property.—In *Ingram v. Rankin*,^(*) Taylor, J., said that damages higher than the value at the time of conversion might be recovered in two cases: first, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; and second, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted. It would seem, however, that even in these cases the principle of damages *in the action of trover* should not be changed. The result indicated is obtained by invoking the principle of following the property in the hands of the wrong-doer. If the property remains in the possession of the wrong-doer, the owner may obtain it in an action of replevin, or he may demand it, and in case of refusal bring an action of trover founded upon the demand and refusal and recover the value of the property at the time and place of the demand. If the wrong-doer has disposed of the property the owner has the option of waiving the tort and recovering the proceeds of the property in an action for money had and received.

(*) 47 Wis. 406, 420.

CHAPTER XVI.

THE MEASURE OF DAMAGES IN ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY.

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| <p>§ 526. Actions for the recovery of personal property.</p> <p>527. Detinue.</p> <p>528. Replevin.</p> <p>529. Nominal damages.</p> <p>530. Early English statutes.</p> <p>531. Value of the property.</p> <p>532. Plaintiff bound by valuation in writ.</p> <p>533. Value, when to be estimated.</p> <p>534. Value increased by labor of defeated party.</p> | <p>§ 535. Damages for detention.</p> <p>536. Decrease in value.</p> <p>537. Value of use.</p> <p>538. Interest as damages for detention.</p> <p>539. Increase or income of the property.</p> <p>540. Consequential damages.</p> <p>541. Sequestration proceeding in Louisiana.</p> <p>542. Reciprocal damages.</p> |
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§ 526. Actions for the recovery of personal property.—Two forms of action were prescribed by the common law for the recovery of specific personal property—detinue and replevin; the first being generally used where there was a tortious detention only, the latter where there was a tortious taking. The action of detinue has become obsolete except in a few jurisdictions. The action of replevin, on the other hand, or a statutory action of a similar nature, is still in force, and is the action ordinarily resorted to for the purpose of securing the possession of personal property.

The procedure in this form of action is peculiar. Where not modified by local practice, the action is begun by the sheriff taking possession of the property under the writ and delivering it to the plaintiff, who is required to execute a bond conditioned to return the property if he proves not to be entitled to it, and to pay

such damages as may be suffered. The question of right to the property is then litigated, and a judgment given for one party or the other; if for the plaintiff, judgment is only for damages in taking and detaining the property; if for the defendant, it is for a return of the property, and damages for taking and detaining it under the writ. By a modern modification often adopted, judgment in the latter case is, as we shall see, in the alternative, either for a return or for the value of the goods.

If judgment is given for the defendant, two courses are open to him. He may take out a writ of execution on the judgment, as in an ordinary case. But he has also the bond given by the plaintiff upon taking the goods under the replevin writ, and he may bring action upon that. If he choose the latter alternative, his measure of recovery is, first, the amount of the judgment in the replevin suit; second, any further compensation secured to him by the bond. It is therefore clear that in an action on the replevin bond questions involving the measure of damages in actions of replevin may be involved, and some cases of actions upon replevin bonds will necessarily be considered in this chapter. The questions ordinarily involved in actions on such bonds will be considered later. What has been said of replevin bonds applies equally to detinue bonds.

§ 527. *Detinue*.—* In detinue, as in debt, no damages were generally given for the thing itself, that being recoverable in specie; but merely for its detention. If, however, the property was not finally returned, then damages might be given for its value.¹ “The action of detinue,” says the Supreme Court of Tennessee, “is for the thing detained and damages for detention: the value

¹ Sayer on Damages, 69, 70.

of the property is ascertained by the jury; and the judgment is in the alternative for the sum so found, as the value in case the thing recovered cannot be had."¹ The question on the issue of *non detinet* was whether the chattel were detained, and if so, what was its value and what the damages for its detention; and so the ordinary modern form of verdict in detinue finds the value of the property and damages for its detention.

But, as has been said, if for any reason the property cannot be returned, the plaintiff is entitled to its full value. So, in the early cases, where we often find detinue brought for charters or title-deeds, if the charters were destroyed or made way with (eloigned), the plaintiff recovered all in damages.^(*) ** Damages for the detention may, without proof of a demand, be recovered in this action from the commencement of the defendant's unlawful possession.^(b) If the property were destroyed while in the defendant's possession, and without his fault, no part of its value should be included by the jury in their estimate of damages; but if the destruction resulted from the defendant's fault or culpable neglect, the jury may include that value in their estimate of damages.^(c) In detinue, deterioration by use is an element of damage ^(d) in addition to the annual rent or hire of the property.^(e) In detinue for slaves, it has been said that emancipation is no defense.^(f) In *Robinson v.*

¹ *Waite v. Dolby*, 8 Humph. 406.

(*) So held where the property, a slave, died after judgment; but the court intimated that in case of death before judgment only nominal damages could have been given. *May v. Jameson*, 11 Ark. 368.

(b) *Gardner v. Boothe*, 31 Ala. 186; *Whitfield v. Whitfield*, 44 Miss. 254.

(c) *Bethea v. McLennon*, 1 Ired. L. 523.

(d) *Freer v. Cowles*, 44 Ala. 314.

(e) *Carroll v. Pathkiller*, 3 Port. 279; *Fralick v. Presley*, 29 Ala. 457; *Glascok v. Hays*, 4 Dana 58.

(f) *Wilkerson v. McDougal*, 48 Ala. 517.

Richards, (*) judgment in detinue (for mules) having been entered "that defendant recover of plaintiff (and appellant) the property sued for, or the value as assessed, at his election, and also the damages as assessed," etc., etc., it was held that the words "at his election" should be stricken out, the court further saying that damages in detinue go with the recovery whether of the chattel or of its value. In *Holly v. Flournoy* (b) it was said that the jury might, in their discretion, assess the highest value between the commencement of the suit and the time of trial.

In a case where detinue was brought for stock certificates, which had been returned *pendente lite*, it was held that the jury might confine themselves to an assessment of damages.¹ In this case the property was demanded; the stock was worth £3 5s.; when it was delivered it had fallen to £1, and the plaintiff was held entitled to recover the difference. A plaintiff in detinue, whose title to the property sued for is legally divested before the trial of the cause, can recover nothing beyond his damages for its detention to the time when his title was divested, and the costs of suit.²

§ 528. *Replevin*.—* The action of detinue has, however, fallen into great disuse, and in some of the States of the Union it is abolished by statute. We proceed, therefore, to the action of replevin. And this action, also, has been so much altered and modified by special statutes, that it will only be proper here to treat of it very succinctly. As to the character of this action, we have already stated that the plaintiff, by his writ, seizes

¹ *Williams v. Archer*, 5 C. B. 318.
See *Archer v. Williams*, 2 Car. & Kir. 26.

² *Cole v. Conolly*, 16 Ala. 271.

(*) 45 Ala. 354.

(b) 54 Ala. 99.

the specific property, and at the same time gives a bond with proper sureties, conditioned to return it, or its value, provided it shall finally appear that he has no right of action. The bond, however, is only a cumulative security to the defendant ; and if the plaintiff fails to establish his right, the court may proceed in the action itself to award damages against him, as the result of a claim declared to be unfounded, for the value of the property taken by him.

The nature of the proceeding is well and briefly stated by Parsons, C. J. :

“The plaintiff having by the service of the writ obtained the possession of the goods replevied, prosecutes it to obtain judgment for damages and costs against the defendant for the caption and detention. These are the objects of his suit. The defendant not only resists the plaintiff's claims, but he also complains of an injury arising from the service of the writ. He demands back the chattels, with damages occasioned by the replevin, and his costs in the defense. . . . The distinction between replevin and other actions in which the plaintiff demands a debt, or damages, or lands, is very clear, because the magnitude of the debt or damages, and the quantity of the land, is involved in the plaintiff's original demand, as well as his title to recover anything. But in replevin, the demand of the defendant is founded on the legal process sued and prosecuted by the plaintiff.”¹ **

The essential distinction between trover and replevin as regards the rule of damages, aside from the element of wilfulness in the taking or detention, is briefly this: In trover, the title to the property is regarded as having passed to the defendant, who is therefore liable for its value simply with interest. In replevin, the title is treated as still in the plaintiff, who is therefore to recover not only the chattel itself or its value, but also damages

¹ Bruce v. Learned, 4 Mass. 614, 617.

for its detention, of which interest may be the measure but is not in all cases the necessary limit.^(*)

Either plaintiff or defendant may have a judgment for the value of the property or for damages for detention ; but the principles regulating the measure of damages will generally be the same, whether the judgment is in favor of the plaintiff or the defendant. Unless a distinction is expressly made, therefore, the principles stated and the authorities cited will apply equally to judgments for plaintiff or defendant.

§ 529. *Nominal damages.*—If the party really entitled to the property fails in the action, on account of a technicality, such as failure to prove a formal demand for the property, the prevailing party recovers nominal damages only.^(b) So when the detention was momentary only, nominal damages for detention will be recovered.^(c)

§ 530. *Early English statutes.*—* In this action the plaintiff had damages at common law ; and, by the statute of Gloucester, costs, as a consequence of such damage ; but the avowant or defendant in replevin had no costs, although in many cases where an avowry or conusance was made, and a return prayed, the defendant was an actor.¹ In consequence of this hardship two statutes were passed ² giving such damages and costs to the defendant as the plaintiff would have had at common law.³ These statutes have been generally re-enacted in this country ; and where the statutes, or the decisions founded on them, do not apply, a reasonable rule may

¹ Bacon Abr. Costs, F. of Costs in Replevin. ² James v. Tutney, Cro. Car. 497 ; Rowley v. Gibbs, 14 Johns. 385 ; Cald-

³ 7 Hen. VIII, ch. 4 ; 21 Hen. VIII, ch. 19. well v. West, 21 N. J. L. 411.

(*) McGavock v. Chamberlain, 20 Ill. 219.

(b) Treat v. Staples, 1 Holmes 1 ; Harman v. Goodrich, 1 Green (Ia.) 13 ; Belt v. Worthington, 3 G. & J. 247 ; Pierce v. Van Dyke, 6 Hill 613.

(c) Whitman v. Merrill, 125 Mass. 127.

generally be deduced from the analogous cases decided upon the actions of trover, trespass *de bonis asportatis*, case for injury to personal property, and on sales of chattels.**

§ 531. **Value of the property.**—Where the chattel is not returned, the damages must cover its value as well as the injuries done by the detention.(*) If there is no evidence on the record, of the value of the property nor of its use, only nominal damages are allowed.(b) In *Washington Ice Co. v. Webster* (c) the property taken was ice. On assessment of damages for the defendant the jury were told that the defendant was entitled to the value of the ice at the time it was taken and where it was situated, for any lawful use to which it could be put. If it was valuable to use there, he is entitled to its value for use. If it was valuable for sale, he is entitled to its value for sale. If it was valuable to send to market he is entitled to whatever value it had at the time and place for any market—its value for any purpose to which it might be put. It was held that this charge was correct, and that if at the place of taking there were no sales, the value should be determined by sales made at the nearest point affording a market. So where the entire machinery of a cloth manufactory, including steam engines and apparatus, had been wrongfully replevied from a manufacturer,

(*) *Benesch v. Weil*, 69 Md. 276; *Frazier v. Fredericks*, 24 N. J. L. 162; *Deal v. Potter*, 26 Up. Can. Q. B. 578; *Lewis v. Teale*, 32 Up. Can. Q. B. 108; *Graham v. O'Callaghan*, 14 Ont. App. 477. If the successful party is a special owner, and the other the general owner, recovery can be only for the interest of the special owner. *Kersenbrock v. Martin*, 12 Neb. 374; *Cruts v. Wray*, 29 Neb. 581.

(b) *Sopris v. Webster*, 1 Col. 507; *acc. Smith v. Houston*, 25 Ark. 183; *Seabury v. Ross*, 69 Ill. 533; *Phenix v. Clark*, 2 Mich. 327.

(c) 68 Me. 449. But it is said that in replevin for goods, where there is no claim that they have fluctuated in value or advanced in price, testimony cannot be allowed as to their value *in view of the hazards of the plaintiff's business*, or what they are worth to *him* in the ordinary course of his business. *Bonesteel v. Orvis*, 22 Wis. 522.

it was held in his suit on the replevin bond, the condition of which was, that the plaintiff in replevin should pay all such costs and damages as the defendant in replevin should recover against him, and should also return the goods in like order as when taken, in case such should be the final judgment, that the measure of damages was the same which under ordinary circumstances attending a sale and purchase might reasonably be agreed on as a fair price for the property between a vendor desirous of selling and a purchaser desirous of purchasing the property as a whole, to be used in the place where it was situated, and for the purpose for which it was intended and arranged.^(*) In replevin for a fence, the plaintiff can only recover the value of the materials after removal, not the value of the fence as it stood on the land.^(b) In Texas, in an action for the recovery of specific property or its value, a valuation by the jury higher than the evidence warranted, with the view of inducing a surrender of the property, was sustained.^(c) Where goods are of special value to the owner, such value may be recovered, though the value to the party in the wrong is much less; so in case of "half-breed scrip"^(d) or of vouchers, statement of expenditures upon a building, and affidavits of their correctness.^(e)

§ 532. Plaintiff bound by valuation in writ.—It has been held in England and in the United States, that the plaintiff in the replevin suit is bound by the estimate of the

(*) *Stevens v. Tuite*, 104 Mass. 328.

(b) *Pennybecker v. McDougal*, 48 Cal. 160.

(c) *Cochrane v. Winburn*, 13 Tex. 143. We know of no warrant for such a doctrine elsewhere.

(d) *Bradley v. Gamelle*, 7 Minn. 331.

(e) *Drake v. Auerbach*, 37 Minn. 505.

property made by himself.^(*) The defendant, however, is not bound by the valuation in the writ,^(b) nor in an action on a replevin bond is the value of the property fixed by the value stated in the undertaking given by the party replevying.^(c)

§ 533. Value, when to be estimated.—The value of the property is to be added to the amount recovered in two different cases: first, in actions on the *detinet*, as it is called, that is, actions in which the property was eloigned or put by the defendant out of the sheriff's reach, so that it could not be restored by the sheriff to the plaintiff at the outset of the proceedings; second, in those jurisdictions permitting such a practice, where the defendant, upon proving his right, is allowed to elect between a return of the goods or their value, or, in any jurisdiction where, upon a judgment for a return of the property, it cannot be found by the sheriff.

In the first case the judgment cannot be for the property, since that is eloigned; it can only be for its value. The action becomes one for the conversion of property, and the measure of damages is the value of the property at the time of the demand by the sheriff,^(d) or in those jurisdictions following that rule the highest value between that time and the trial.^(e)

¹ *Middleton v. Bryan*, 3 M. & S. 155.

(*) *Schmidt v. Nunan*, 63 Cal. 371; *Tuck v. Moses*, 58 Me. 461; *Washington Ice Co. v. Webster*, 62 Me. 341; *Tiedman v. O'Brien*, 36 N. Y. Super. Ct. 539. But in *Briggs v. Wiswell*, 56 N. H. 319, it was said the value in the writ of replevin is *prima facie* evidence against the plaintiff on the trial.

(b) *Thomas v. Spofford*, 46 Me. 408; *Tuck v. Moses*, 58 Me. 461.

(c) *Sweeney v. Lomme*, 22 Wall. 208; *West v. Caldwell*, 23 N. J. L. 736.

(d) *Yelton v. Slinkard*, 85 Ind. 190; *Peters B. & L. Co. v. Lesh*, 119 Ind. 98; *Garrett v. Wood*, 3 Kas., 231; *Sherman v. Clark*, 24 Minn. 37; *Pope v. Jenkins*, 30 Mo. 528; but *contra*, *Miller v. Bryden*, 34 Mo. App. 602 (value at time of trial).

(e) *Tully v. Harloe*, 35 Cal. 302.

In the second case, the prevailing party (the defendant) is entitled to a return ; and the value of the property is given him as compensation for the plaintiff's failure to return. If the defendant elects to take the value, or if the verdict is given in the alternative for the property or its value, the value is to be assessed at the time of the trial ; (*) if judgment is given for a return, and, the sheriff not being able to find the property, damages are assessed on the bond, the value is to be taken at the time of the demand under the writ of restitution. (b)

In Tennessee the rule is different. The value of the property is estimated at the time of the replevin writ. In addition, if the property have increased in value since the seizure, and remain at the time of the trial at a higher point than when seized, the difference must be allowed the defendant as damages for the detention ; if the value be greater at the trial than it had been at the seizure, but the increase be temporary, it will be left to the jury to allow the temporary increase as damages or not. (c)

§ 534. Value increased by labor of defeated party.—Where a return of the chattels in their condition at the time of the taking cannot be had—their original value having been increased through labor of the defendant bestowed on them in good faith—the measure of the plaintiff's recovery does not now usually include the ad-

(*) *Hepburn v. Sewell*, 5 H. & J. 211 ; *Miller v. Whitson*, 40 Mo. 97 ; *Chapman v. Kerr*, 80 Mo. 158 ; *Mix v. Kepner*, 81 Mo. 93 ; *Hutchins v. Buckner*, 3 Mo. App. 595 ; *Brewster v. Silliman*, 38 N. Y. 423 ; *New York G. & I. Co. v. Flynn*, 55 N. Y. 653 ; (but *Brizsee v. Maybee*, 21 Wend. 144, is *contra*) ; *Scott v. Elliott*, 63 N. C. 215 ; *Morris v. Coburn*, 71 Tex. 406. See, however, a different rule in Michigan and Nebraska, § 764, *infra*.

(b) *Howe v. Handley*, 28 Me. 241 ; *Washington Ice Co. v. Webster*, 62 Me. 341 ; *Swift v. Barnes*, 16 Pick. 194.

(c) *Mayberry v. Cliffe*, 7 Coldw. 117.

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ditional value.^(a) So in replevin for a yacht, a defendant who claimed her under a purchase was allowed, in Massachusetts, to show the amount of his expenditures in improving her after his purchase and before the service of the writ.^(b) But if the wrongful taking was wilful, the increased value is the measure of damages.^(c)

§ 535. **Damages for detention.**—Damages for detention are assessed to the time of the verdict,^(d) and they may be given in an action on the replevin bond, although not previously assessed.^(e) In Illinois it has been held, where there was no proof of actual damage, to be error for a jury to assess the damages at \$50. In such a case only nominal damages can be recovered.^(f) In a case in Texas it was held that, as a general rule, no damages could be given for detention, the value of the property at the time of the “conversion,” with interest, being the measure of damages.^(g) In this case the court obviously confused the action with the action of trover. The rules governing the measure of damages in the two are, however, entirely different.

In Michigan and Nebraska it is held that if the prevailing party elects to take the value of the property instead of asking for a return, he can have no damages for detention of the property, but only the value at the

(a) *Peters B. & L. Co. v. Lesh*, 119 Ind. 98; *Heard v. James*, 49 Miss. 236; *Buckley v. Buckley*, 12 Nev. 423; *Herdic v. Young*, 55 Pa. 176; *Single v. Schneider*, 30 Wis. 570; 24 Wis. 299; *Hungerford v. Redford*, 29 Wis. 345.

(b) *Veazie v. Somerby*, 5 All. 280.

(c) *Heard v. James*, 49 Miss. 236.

(d) *Lesser v. Norman*, 51 Ark. 301. If the property is returned pending suit, it is said that the expense of securing the return may be recovered as damages for detention. *Leonard v. Maginnis*, 34 Minn. 506.

(e) *Smith v. Dillingham*, 33 Me. 384; *Washington Ice Co. v. Webster*, 62 Me. 341.

(f) *Seabury v. Ross*, 69 Ill. 533.

(g) *Gillies v. Wofford*, 26 Tex. 76.

time of the taking, with interest.^(*) In *Romberg v. Hughes* ^(b) the court said :

“It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself and not its value. In such case when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon.”

Where this rule is adopted, the peculiar action of replevin becomes, upon the election of the prevailing party to take the value of the property, exactly like an action of trover, and the same rule of damages is adopted.

§ 536. *Decrease in value.*—Where the goods depreciated in value during the period of detention, the successful party can always recover the amount of the depreciation as damages for detention.^(c) It is unimportant whether such depreciation arise from the defendant's act or default, or not ; nor need there be a special averment of this cause of damage to sustain a recovery on this ground.^(d)

^(*) *Hanselman v. Kegel*, 60 Mich. 540 ; *Just v. Porter*, 64 Mich. 565 ; *Nitz v. Bolton*, 71 Mich. 388 ; *Hainer v. Lee*, 12 Neb. 452 ; *Aultman v. Stichler*, 21 Neb. 72.

^(b) 18 Neb. 579, 582.

^(c) *Dalby v. Campbell*, 26 Ill. App. 502 ; *Yelton v. Slinkard*, 85 Ind. 190 ; *Russell v. Smith*, 14 Kas. 366 ; *Washington Ice Co. v. Webster*, 62 Me. 341 ; *Aber v. Bratton*, 60 Mich. 357 ; *Hooker v. Hammill*, 7 Neb. 231 ; *Moore v. Kepner*, 7 Neb. 291 ; *Rowley v. Gibbs*, 14 Johns. 385 ; *Boylston Ins. Co. v. Davis*, 70 N. C. 485 ; *Harrison v. Chappell*, 84 N. C. 258 ; *Zitske v. Goldberg*, 38 Wis. 216. So of notes of third parties. *Sullivan v. Sullivan*, 20 S. C. 509.

^(d) *Young v. Willet*, 8 Bosw. 486 ; but in *Odell v. Hole*, 25 Ill. 204, an action for the replevin of a mare, it was said that damages for *natural* depreciation could not be recovered where damages for use of the property were given ; but even in that case damages could be recovered for depreciation caused by the default of the party in the wrong.

But the plaintiff who retains the articles replevied till judgment in the suit, cannot, if he succeed, claim damages for the depreciation in their value ; because he may always convert them into money.¹

§ 537. *Value of use.*—If the owner of the goods was deprived of the use of them pending the replevin proceedings, he is entitled to the value of the use, if any.^(*) No such compensation will be given except upon proof that the owner was actually deprived of the use by the replevin proceedings ; ^(b) but it is not necessary to show that he procured a substitute for the property taken from him.^(c) Where, however, a pledgee succeeds in his action of replevin against the pledgor he can recover no compensation for use, since he has no right to use the pledged property ; ^(d) and the same is true where the prevailing party is a mortgagee after default.^(e)

§ 538. *Interest as damages for detention.*—Where property is held by the owner, not for continuing use, but for consumption or sale, it is evident that no compensation can be recovered for use of the property ; yet he

¹ *Gordon v. Jenney*, 16 Mass. 465.

(*) *Dunnahoe v. Williams*, 24 Ark. 264 ; *Minkwitz v. Steen*, 36 Ark. 260 ; *Butler v. Mehrling*, 15 Ill. 488 ; *Odell v. Hole*, 25 Ill. 204 ; *Yandle v. Kingsbury*, 17 Kas. 195 ; *Ladd v. Brewer*, 17 Kas. 204 ; *Bell v. Campbell*, 17 Kas. 211 ; *Kennett v. Fickel*, 41 Kas. 211 ; *Washington Ice Co. v. Webster*, 62 Me. 341 ; *Crabtree v. Clapham*, 67 Me. 326 ; *Boston Loan Co. v. Myers*, 143 Mass. 446 ; *Burt v. Burt*, 41 Mich. 82 ; *Aber v. Bratton*, 60 Mich. 357 ; *Reno v. Kingsbury*, 39 Mo. App. 240 ; *Morgan v. Reynolds*, 1 Mont. 163 ; *Chauvin v. Valiton*, 8 Mont. 451 ; *Allen v. Fox*, 51 N. Y. 562 ; *Scott v. Elliott*, 63 N. C. 215 ; *Coffin v. Taylor*, 16 Ore. 375 ; *Stanley v. Donoho*, 16 Lea 492 ; *Robbins v. Walters*, 2 Tex. 130 ; *Williams v. Phelps*, 16 Wis. 81 ; *Zitske v. Goldberg*, 38 Wis. 216 ; *contra*, *Twinam v. Swart*, 4 Lans. 263.

(*) *Bartlett v. Brickett*, 14 All. 62 ; *Barney v. Douglass*, 22 Wis. 464.

(*) *Boston Loan Co. v. Myers*, 143 Mass. 446.

(*) *McArthur v. Howett*, 72 Ill. 358.

(*) *Thompson v. Scheid*, 39 Minn. 102.

has suffered damage by the detention of the property from him. This damage, in cases where the value of the use cannot be recovered, is measured by interest on the value of the property detained.^(a) The presumption is that damages for detention are to be so measured.^(b) But if damages by way of compensation for use are recovered, there can be no recovery of interest.^(c)

So in replevin for grain, the measure of damages is interest on the value.^(d) It is said that in replevin for certified bank checks, the damages are confined to interest on the amount.^(e) So of a county warrant for the plaintiff's services.^(f) But where the goods attached were subject to duties, and the plaintiff paid them, it was held in an action on the replevin bond that the interest should be computed only on the difference between the amount so paid and the valuation in the writ of replevin.¹ Interest should be at the statutory rate; and this was held

¹ *Huggeford v. Ford*, 11 Pick. 223. See, also, *Mattoon v. Pearce*, 12 Mass. 406.

(a) *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66; *Sleppy v. Bank of Commerce*, 8 Sawy. 17; *Kelly v. Altemus*, 34 Ark. 184; *Hanauer v. Bartels*, 2 Col. 514; *Hurd v. Gallaher*, 14 Ia. 394; *Yandle v. Kingsbury*, 17 Kas. 195 (*semble*); *Ladd v. Brewer*, 17 Kas. 204; *Bell v. Campbell*, 17 Kas. 211; *Palmer v. Meiners*, 17 Kas. 478; *Washington Ice Co. v. Webster*, 62 Me. 341; *Wood v. Braynard*, 9 Pick. 322; *Stevens v. Tuite*, 104 Mass. 328; *Berthold v. Fox*, 13 Minn. 501; *Woodburn v. Cogdal*, 39 Mo. 222; *Reno v. Kingsbury*, 39 Mo. App. 240; *Blackie v. Cooney*, 8 Nev. 41; *Brizsee v. Maybee*, 21 Wend. 144; *Redmond v. American Mfg. Co.*, 24 N. E. Rep. 924 (N. Y.); *Mayberry v. Cliffe*, 7 Coldw. 117; *Bigelow v. Doolittle*, 36 Wis. 115. *Contra*, *Scott v. Elliott*, 63 N. C. 215; *Potapsco v. Magee*, 86 N. C. 350. In Indiana it was said that interest on the value of the property might be allowed by way of damages in an action on the replevin bond. *Walls v. Johnson*, 16 Ind. 374.

(b) *New York G. & I. Co. v. Flynn*, 55 N. Y. 653.

(c) *Freeborn v. Norcross*, 49 Cal. 313; *McCarty v. Quimby*, 12 Kas. 494; *Reno v. Kingsbury*, 39 Mo. App. 240; *Smith v. Roby*, 6 Heisk. 546.

(d) *Machette v. Wanless*, 2 Col. 169.

(e) *Merchants' S. L. & T. Co. v. Goodrich*, 75 Ill. 554.

(f) *McCoy v. Cornell*, 40 Ia. 457.

to be the case even where the property detained was a savings-bank book, and the bank paid less than the statutory rate of interest.^(a) The value of the use of money is not limited by the savings-bank rate, for the holder can withdraw his deposit at any time.

§ 539. **Increase or income of the property.**—The owner recovers not only the property, but any increase or income from it during the period of detention, as young born during the detention of a slave or animal,^(b) wool clipped from sheep,^(c) or dividends collected on the stock while it was retained.^(d) But it has been held in Nevada that the value of the wool from the sheep while detained could not be recovered unless pleaded as special damage.^(e)

§ 540. **Consequential damages.**—It has been intimated, in Massachusetts, that if special damage were shown to have been suffered by the defendant, it might be allowed.¹ And where machinery in actual use in a factory was wrongfully replevied from the manufacturer, his damages were held ^(f) to include compensation for the general inconvenience and loss resulting from the interruption of his possession;^(g) and compensation for the expense, trouble, and delay of restoring the property to its former condition.^(h) So where a machine was taken to prevent

¹ *Barnes v. Bartlett*, 15 Pick. 71; but in New York, the right of recovering special damages in this action has been doubted. *Brizsee v. Maybee*, 21 Wend. 144; although if the analogy of trover be followed, they would probably now be allowed to a limited extent. See *McDonald v. North*, 47 Barb. 530.

(a) *Wegner v. Second W. S. Bank*, 76 Wis. 242.

(b) *Jordan v. Thomas*, 31 Miss. 557; *Buckley v. Buckley*, 12 Nev. 423; *Morris v. Coburn*, 71 Tex. 406.

(c) *Harrison v. Ilgner*, 74 Tex. 86.

(d) *Bercich v. Marye*, 9 Nev. 312.

(e) *Buckley v. Buckley*, 12 Nev. 423.

(f) *Stevens v. Tuite*, 104 Mass. 328.

(g) *Acc. Davenport v. Ledger*, 80 Ill. 574.

(h) *Acc. Zitske v. Goldberg*, 38 Wis. 216.

the plaintiff from using it as a model for the construction of other machines, he may recover its value to him.^(a) So, it has been held by the English Court of Common Pleas, that special damages may be recovered in this action. "When the goods were not redelivered by the sheriff, according to the books, it would appear that the plaintiff could recover the full amount of the damages that he had sustained. . . . I see no reason in principle, why there should be any limitation as to the amount of the damages recoverable in such a case. I do not know any ground in law, for confining the damages to the amount of the expenses of the replevin bond. In practice, these expenses are all that are recovered, merely because there is generally no other damage. . . . Whatever damages have been actually sustained may be recovered."^(b) Where a plaintiff wrongfully replevied ice belonging to the defendant, it was held that the latter could recover the expense of procuring teams and appurtenances for the purpose of removing the ice, it having been actually incurred, and the teams, etc., having been rendered useless by the suing out the writ of replevin. It was held in this case that the defendant could not recover damages arising from a possible loss of customers, that being too indefinite, remote, and contingent to become an element of damage. It was said, also, that the plaintiff could not recover for a liability on outstanding contracts, since he could have replaced himself in the market.^(c) The owner may recover the expense of a reasonable attempt to recover the property,^(d) but he cannot recover the expense of an ill-advised

(a) *Berry v. Vantries*, 12 S. & R. 89. This was really recovering the value of the use.

(b) *Bovill, C. J., in Gibbs v. Cruikshank*, L. R. 8 C. P. 454, 459.

(c) *Washington Ice Co. v. Webster*, 62 Me. 341.

(d) *Bennett v. Lockwood*, 20 Wend. 223; *Davis S. M. Co. v. Best*, 50 Hun 76. But *contra*, *Taylor v. Morton*, 61 Miss. 24.

and ineffectual journey, taken with the object of repossessing himself of the property after it was in the sheriff's hands, without being prepared to take it by legal proceedings.^(*)

In *Riley v. Littlefield* ^(b) replevin was brought for a race-horse. It appeared that the horse had been entered in races, and on account of the seizure had not been able to race. By regulation of the association which carried on horse-racing, the owner of the horse was obliged to pay certain fines on account of the non-appearance of the horse at the races, or he would be allowed to enter in no more races. This, however, was held to be too remote for compensation.

§ 541. Sequestration proceeding in Louisiana.—In Louisiana, proceeding by sequestration is strongly analogous to the replevin or attachment of the common law, and the party plaintiff gives a bond with sureties "to pay all damages that may accrue in case it shall appear the sequestration was wrongfully sued out." In a suit on such a bond, it has been decided in that State that the counsel fees of the first suit can be recovered on such bond; nor is it material to show that such fees have been actually paid; it is enough that the plaintiff has incurred a liability for them.¹

§ 542. Reciprocal damages.—* It is the peculiarity of this action, that both parties may be actors; and so if it is found that a part of the property claimed is the plaintiff's, and a part not, both plaintiff and defendant may recover damages against each other; ¹ ** and also costs.^(c)

¹ *Jones v. Doles*, 3 La. Ann. 588. ² *Powell v. Hinsdale*, 5 Mass. 343.

(*) *Kelley v. McKibben*, 53 Cal. 13; *Barney v. Douglass*, 22 Wis. 464.

(b) 47 N. W. Rep. 576 (Mich.).

(c) *Knowles v. Pierce*, 5 Houst. 178. But not counsel fees: *Jandt v. South*, 2 Dak. 46.

CHAPTER XVII.

THE MEASURE OF DAMAGES IN ACTIONS AGAINST OFFICERS.

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| <p>§ 543. Ministerial officers responsible for violations of duty.</p> <p>544. Actual injury furnishes the general rule.</p> <p>545. General rule.</p> <p>546. Burden of proof.</p> <p>547. Nominal damages.</p> <p>548. Mitigation.</p> <p>549. Failure to levy.</p> <p>550. Failure to attach.</p> <p>551. Failure to arrest.</p> <p>552. Escape.</p> <p>553. Value of custody—The rule in England.</p> <p>554. American rule.</p> <p>555. Insufficient bail or surety.</p> | <p>§ 556. Failure to return.</p> <p>557. False return.</p> <p>558. Miscellaneous breaches of duty.</p> <p>559. Magistrate.</p> <p>560. County clerk.</p> <p>561. Treasurer.</p> <p>562. Town officers.</p> <p>563. Collector of customs.</p> <p>564. Trespass by officer.</p> <p>565. Wrongful attachment.</p> <p>566. Suits between different officers.</p> <p>567. Receptors.</p> <p>568. Property sold illegally.</p> <p>569. Exclusion from office.</p> |
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§ 543. Ministerial officers responsible for violations of duty.—* We shall now consider that class of cases which arise out of the acts of the public officers who are charged with the ministerial portion of the administration of government. It is well settled under the English system, that sheriffs and other ministerial officers in case of neglect or violation of duty, are responsible to the party aggrieved in a civil action.(*) The mode prescribed is usually one of the great class of actions on the case; but the proceeding often takes the form of trespass. To

(*) *Clark v. Miller*, 47 Barb. 38; 54 N. Y. 528. Public officers, however, vested by law with discretionary authority, and acting within its scope, are not answerable in damages for the consequences of their acts, unless done maliciously and with intent to injure. *Burton v. Fulton*, 49 Pa. 151.

this general remedy, which flows from the principles of the common law, is frequently superadded some special statutory relief, enforced by some particular penalty ; but the addition of such particular remedy does not interfere in any way with the right of the party to his compensation for the actual injury done in a suit of trespass, or on the case.^{1**} Every public officer is required to give bonds with sureties for the proper discharge of his duties, and in some jurisdictions an action against an officer for wrongful acts in the discharge of his duties may be brought upon his bond, and often is so brought. It is evident that the measure of damages should in general be the same, whether the injured party brings an action of tort or resorts to the bond, the real cause of action being a tort in either case ; and therefore actions brought upon official bonds are frequently authorities upon the subjects discussed in this chapter, and many such actions will be found herein. The peculiar questions which arise by reason of the action being brought upon the bond will be discussed later.(*)

§ 544. Actual injury furnishes the general rule.—* The ordinary cases in which the questions arise which we are now about to examine, are presented in suits against sheriffs or other ministerial officers, either for negligence, as the escape of parties arrested on *mesne* or final process, for taking insufficient security, for neglect to seize or preserve property on execution, or omission to make a

¹ As a general principle, it is well settled, in regard to all public officers, that although created by statute, and although liable to the infliction of penalties for violation of official duty, they are still equally responsible to the aggrieved party, in an action on the case. "Where the law," says the Supreme Court of Maine, "has affixed forfeitures for certain infractions thereof, or for neglects in not conforming to its requirements, whereby individuals are injured, they are not in consequence thereof deprived of the remedy which would exist if no penalties were prescribed." *Hayes v. Porter*, 22 Me. 371, 376; *Beckford v. Hood*, 7 T. R. 620; *Farmers' Turnpike v. Coventry*, 10 Johns. 389.

(*) See chapter on Bonds.

true return to the writ ; or, on the other hand, for an excess of their powers, as for levying upon property which they are not authorized to do so by the process, excessive distress, etc. And in these cases we shall find the general principle to be, although the form of the action be in tort, that the party aggrieved is entitled, independent of any statutory relief, to recover only to the extent of his actual injury.

It is not correct, however, says the Supreme Court of Vermont, to hold " that in actions of trespass for taking personal property, when the defendant is an officer acting under legal process, no damages can in any case be recovered beyond the actual value of the property. Courts usually in such cases instruct the jury that they ought to confine themselves within those limits. It is a rule of practice merely. Circumstances may require a departure from it." ¹ (*)

The rule is, indeed, subject to many modifications ; partly arising from the vagueness that we have often had occasion to notice in the early cases ;² partly from the

¹ Joyal v. Barney, 20 Vt. 154, 159.

² Ravenscroft v. Eyles, Warden of the Fleet, 2 Wils. 294 (1766), is very strong to show the power which the courts originally gave in these cases to the jury. It was case for a voluntary escape ; and the question being whether the action lay, the debtor having returned to custody before suit brought, and judgment having been recovered against him, Lord C. J. Wilmot said : " The *quantum* of damages is nothing to the purpose ; for if the jury had power in this case to give damages, we must now take it that they have done right ; and I am of opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper ; for this being an action upon the case,

the damages were totally uncertain and at large."

In Sayer on Damages, 56, this case is stated to have been tried before Lord Camden, C. J. ; that it was proved at the trial that the debt was *speciate* ; and that on the argument, Bathurst, J., said : " Whether the debt was *speciate* or not, I take it to be a settled point, if the escape is a voluntary one, that it is the duty of the jury to assess damages to the amount of the whole debt." But by the report in 2 Wilson, above cited, no such point was made before the court on the subject of damages.

In Kent v. Kelway, case for rescue from arrest (Lane, 70 ; Sayer on Damages, 55), it is said that damages may be recovered to the amount of the debt for which the arrest was.

(*) Acc. Dobbs v. The Justices, etc., 17 Ga. 624.

variety of the forms of action employed ; and partly from the application of the rules of evidence ; and partly from the general principle that in actions of tort the intent, disposition, and conduct of the defendant always bear largely on the question of damages.¹ And these various questions we shall better understand by an examination of the cases.**

§ 545. *General rule.*—* As a general rule, however, it is settled that the measure of damages in suits of this class, brought against a public officer by a creditor plaintiff, whose remedy against his debtor has been impaired by the neglect or other misconduct of the officer, is the actual injury sustained, this actual injury being measured by the amount of the original debt due the plaintiff, or the value of the property, which has been lost or prejudiced by the neglect of the officer,** unless it is shown that the plaintiff's actual loss was less.(*)

§ 546. *Burden of proof.*—* It is an important question, where the breach of duty is clear, on whom does the proof of damage rest ? Is the plaintiff to prove that he is damnified, or is the officer to disprove the fact ? Our law, proceeding on a principle of evidence, throws the burden of proof on the negligent party, and assumes that

¹ In *Bayley v. Bates*, 8 Johns. 185, in tort and fraud, and it draws into the Supreme Court of New York said : consideration, in a greater or less degree, the *quo animo* of the defendant."

(*) *Marcum v. Burgess*, 67 Ala. 556 ; *Phelps v. Owens*, 11 Cal. 22 ; *Pelberg v. Gorham*, 23 Cal. 349 ; *Spain v. Clements*, 63 Ga. 786 ; *French v. Snyder*, 30 Ill. 339 ; *Plummer v. Harbut*, 5 Ia. 308 ; *Crane v. Stone*, 15 Kas. 94 ; *Commonwealth v. Lightfoot*, 7 B. Mon. 298 ; *Marshall v. Simpson*, 13 La. Ann. 437 ; *Bogel v. Bell*, 15 La. Ann. 163 ; *Whitaker v. Sumner*, 9 Pick. 308 ; *State v. Cobb*, 64 Mo. 586 ; *Randall v. Greenhood*, 3 Mont. 506 ; *Goodrich v. Foster*, 20 N. H. 177 ; *Clark v. Miller*, 54 N. Y. 528 ; *Hamner v. Griffith*, 1 Grant 193 ; *Hogan v. Kellum*, 13 Tex. 396 ; *Briggs v. Gleason*, 29 Vt. 78 ; *Blodgett v. Brattleboro*, 30 Vt. 579 ; *Parker v. Peabody*, 56 Vt. 221 ; *Beveridge v. Welch*, 7 Wis. 465.

the plaintiff is injured until the contrary appear. It might be urged that this should not be so, where there is mere ordinary negligence unaccompanied by any criminal intention ; but as with common carriers, so with public officers, there are reasons, of controlling weight, why the party to whom a great trust is confided, and in whose hands usually all the testimony must be, should be compelled to exculpate himself after a *prima facie* case of negligence is made out against him. (*)

There appears, however, to be a discrepancy on this point between the English and American rule. In England, it would seem, though it is by no means clear, that the plaintiff must show affirmatively that he could have collected his debt but for the negligence of the defendant.

The earliest case on this subject¹ runs thus : "An action upon the case against a sheriff, upon an escape suffered by his bailee upon a mesne process, and it was in evidence, as is necessary to make this case, that there was such a debt, that such a process and warrant was, and a due debt, and lastly, that the party arrested was become insolvent ; otherwise he should not have recovered damages to the value of his debt, as he here did upon all this proved in evidence as aforesaid."

On the authority of this case, Mr. Peake² lays down the rule thus : "In order to show the amount of damages he has sustained, the plaintiff should also prove the circumstances of the defendant at the time of the arrest, and that he has since absconded, or become insolvent ; for if the defendant were originally in bad circumstances, or he may be met with every day, and the plaintiff has

¹ *Tempest v. Linley*, Clayton, 34.

² *Norris' Peake*, 608.

(*) *Sheldon v. Upham*, 14 R. I. 493.

not, in fact, been injured by the negligence of the defendant, the damages will be merely nominal." Mr. Starkie briefly says:¹ "The plaintiff must prove his debt and the damages which he has sustained from the sheriff's negligence."

In this country, it appears to be settled that the plaintiff, after proving his debt against the prisoner, the custody, and escape, is entitled to recover as his damages the amount of his debt, unless the officer can show that the defendant was insolvent, or in any other way prove that the plaintiff has sustained no actual loss.^(*) "The body," says Mr. J. Cowen, in a case in New York,² "is considered the highest satisfaction in the law; that is, for the time, gone by the sheriff's negligence, and it is doing no violence to say, that a defendant who would escape had *prima facie* secreted himself, or otherwise placed himself and property beyond the reach of execution."

In this case the question as to the burden of proof was distinctly presented. The sheriff of New York was sued for the escape of one Kelly, against whom the plaintiff had recovered a judgment for \$10,722.98; the debt and escape being proved, Edwards, C. J., charged, that to entitle the plaintiff to recover beyond nominal damages, it was incumbent on him to show the extent of the injury sustained by him; and a verdict for such damages only, was accordingly rendered. On motion for a new trial, the court held the burden to be on the defendant, and granted a new trial; admitting, however,

¹ Evidence—Sheriff—Escape. Vol. ii. 1016.

² Patterson v. Westervelt, 17 Wend. 543, 548.

(*) State *ex rel.* Shirk v. Mullen, 50 Ind. 598; State use of Goddard v. Baden, 11 Md. 317; Looney v. Orser, 4 Bosw. 391.

that their decision was at variance with the English rule ; but insisting that it was not unreasonable to assume that the plaintiff had lost his debt by the defendant's negligence, until the contrary should be proved.**

§ 547. *Nominal damages.*—* It would seem, on the general principles which we have already considered, that even if it affirmatively appear that the plaintiff has sustained no damage, the officer guilty of a technical violation of duty would still be liable for nominal damages.** But a distinction was taken at a comparatively early day in England, between the liability of officers for default in the execution of writs of mesne and of final process, and which is sustained by a series of decisions. Where the writ relates to mesne process, it is held that, as it is uncertain whether the aggrieved party would recover at all against the original defendant, he can recover from the officer such damages only, as he can show he has sustained. But in an action on the case for the sheriff's omission to arrest the debtor, on final process, or for an escape on such process, although no actual damage be proved, he is held liable, in any event, to nominal damages. His negligence in this case deprives the plaintiff of the satisfaction which, after judgment, is in law imported by the possession of the debtor's body.(*). So in case for not executing a *ca. sa.*, the jury found that the sheriff was in default, but that the plaintiff had sustained no damage ; and a verdict was entered for the defendant. But on argument, verdict was entered for the plaintiff, with nominal damages ; Lord Denman saying : " When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled

(*) *Planck v. Anderson*, 5 T. R. 37 ; *Lewis v. Morland*, 2 B. & Ald. 56 ; *Scott v. Henley*, 1 M. & Rob. 227.

to an action against that party for some amount. There is no authority to the contrary."¹

With the above exceptions of actions for not arresting a debtor on final process, or for allowing him to escape when held on such process, it seems to be settled in England, that civil actions against ministerial officers for neglect of duty, cannot be maintained, unless damage thereby accrues to the plaintiff, although the neglect affords a presumption of damage which must be disproved to entitle the defendant to a verdict. This has been held in actions against sheriffs, for the omission to seize goods to which the plaintiff has a present right of possession, or to execute a *capias*, or to levy under a *fi. fa.*, or for his making a false return.(*) The distinction

¹ *Clifton v. Hooper*, 6 Q. B. 468; 14 L. J. N. S. Q. B. 1. In an early case, where the sheriffs of Norwich sued the defendant, who had escaped by a rescue, on the ground of their liability over to I. S., at whose suit they arrested him, it was objected that the plaintiffs had not shown that they were charged, or in any way damnified; but

the objection was held ill. *Sheriffs of Norwich v. Bradshaw*, Cro. Eliz. 53.

In *Crompton v. Ward*, 1 Str. 429, 436, it is said that the plaintiff has an interest, a sort of property, in the body of the prisoner, and sustains a damage by a rescue. But *what* damage is not said.

(*) *Randell v. Wheble*, 10 A. & E. 719; *Hobson v. Thelluson*, L. R. 2 Q. B. 642; *Stimson v. Farnham*, L. R. 7 Q. B. 175; *Tancred v. Allgood*, 4 H. & N. 438; 28 L. J. N. S. Ex. 362. The earlier cases were in conflict. In *Powel v. Hord*, 1 Strange 650, an action for a false return on mesne process, the court held: "That if the defendant were a man of estate, and could still be taken, and so no damage, they should think the debt too much to give; but that *not being this case*," the jury found the whole debt as damages, with the opinion of the chief justice. And in *Planck v. Anderson*, 5 T. R. 37, it was held that the sheriff is not liable to an action for an escape on mesne process, if the jury find that the plaintiff has not been delayed or prejudiced in his suit. In *Barker v. Green*, 2 Bing. 317, case for not arresting J. W., it was held that though the plaintiff had sustained no actual damage, it was still a case for nominal damages, and the court refused to enter a nonsuit. But in *Williams v. Mostyn*, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and *it was admitted* that the plaintiff had sustained no *actual damage or delay*, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff, with *nominal damage*. And on motion the court directed a *non-*

thus established in England, by which no liability attends the neglect of official duty unless the neglect results in positive loss to the person aggrieved, is founded on the assumption that the right of a suitor (or other person in a corresponding relation) to the officer's services, is in fact a right only to such pecuniary benefit as can be derived from them, and that if no such benefit can be obtained, no right exists. The exception has apparently been recognized in New York, in other cases than actions against sheriffs, and which seem to proceed upon such a distinction, though it was not in terms adverted to.^(*) But although, owing to the abolition of imprisonment for a simple debt, the question loses its importance in reference to actions for the sheriff's neglect of duty, in those cases in which the defendant could formerly have been arrested as of course, we think the exception is to be regretted, both as anomalous, and as tending to laxity in the discharge of official duty. Under circumstances giving an officer no discretion, his failure to fulfil a positive duty for the benefit or protection of others should

suit to be entered, saying, "that there had been *no damage in fact or law*"; and they disapproved of *Barker v. Green*. In *Bales v. Wingfield*, 4 Q. B. 580, where case was brought against the sheriff for neglecting to sell under a *fi. fa.*, the writ was delivered to the sheriff, who seized on the 24th, and advertised a sale for the 6th of May; he did not, in fact, sell till the 27th. On the 15th of May a fiat in bankruptcy issued, and so the sheriff returned "no goods." The Q. B. held, that it lay on the plaintiff to show damage; and a verdict for nominal damages being entered, they refused to set it aside. But in *Wylie v. Birch*, 4 Q. B. 566, case for a false return, Lord Denman, C. J., assumed the principle, that the action could not be maintained against the sheriff for breach of duty, unless damage accrued thereby to the plaintiff, and cited the above cases; but said, also, that the breach of duty afforded presumption of some damage to the party who sets the sheriff in motion; and in such a case it seems still in England, that if the plaintiff offered no proof of actual injury, he would be entitled to nominal damages.

(*) *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Bridge v. Mason*, 45 Barb. 37.

always be, in a legal sense, a wrong to the person in whose behalf the duty should have been discharged; and where there is a legal wrong there should always be a legal remedy. A right of action should accrue when the breach of duty is committed; and once existing, should not be destroyed by the circumstance that it afterwards proves to inflict no pecuniary damage.^(*)

In this country nominal damages at least are usually given for every breach of duty by a public officer.^(b) So in case of neglect to return an execution, although no injury appear to have resulted, judgment will still be given for nominal damages.¹ So in a case in Massachusetts, against a sheriff for neglecting to return an execution, the Supreme Court of that State said: "The plaintiff is entitled to nominal damages for the officer's neglect. No actual damages are proved, but where there is a neglect of duty, the law presumes damages."²

§ 548. Mitigation.—*Where the plaintiff proceeds on account of the loss of a debt the original debt is, of course, the gist of the action, and it is perfectly well settled that the existence of such debt must be proved by the plaintiff.³ But if that fact is established, the equally important inquiry remains, whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether, under any circumstances, it could have been collected of the defendant's property.^(c) The question sometimes arises on mesne, and sometimes on final process.^{**}

It also presents itself in other actions of this class.

¹ *Kidder v. Barker*, 18 Vt. 454.

² *Gunter v. Cleyton*, 2 Lev. 85;

³ *Lafin v. Willard*, 16 Pick. 64. See *Alexander v. Macauley*, 4 T. R. 611. also *Goodnow v. Willard*, 5 Met. 571.

(*) *Pelham v. Way*, 15 Wall. 196; *Dow v. Humbert*, 91 U. S. 294.

(b) *Metzner v. Graham*, 66 Mo. 653. But *contra*, *Dwyer v. Woulfe*, 40 La Ann. 46; *Amperse v. Winslow*, 75 Mich. 234.

(c) *Crooker v. Melick*, 18 Neb. 227; *Hellman v. Spielman*, 19 Neb. 152.

An officer who has attached property and taken a receipt for it, cannot show in mitigation of damages, in an action brought for his not delivering the property or the receipt, that the property was worth less than the value alleged in his return.^(*) But in case against a sheriff for illegally selling goods lawfully seized and held by him, and which had deteriorated without his default, the measure of damages is said, by the Supreme Court of Vermont, not to be their value when taken, but at the time of the sale.^(b)

§ 549. Failure to levy.—For failure to levy the defendant is liable *prima facie* for the whole debt,^(c) and conclusively so unless he can mitigate the amount by showing that he was unable to collect it by an exercise of proper diligence,^(d) as, if the defendant in the execution was insolvent, or the plaintiff himself have been the cause why the whole was not collected.¹ If, however, the land on which the defendant should have levied is worth less than the debt, the measure of damages is the value of the land,^(e) and that value is to be measured by what the land

¹ Pardee v. Robertson, 6 Hill 550.

(*) Allen v. Doyle, 33 Me. 420.

(b) Walker v. Wilmarth, 37 Vt. 289.

(c) Bank of Rome v. Curtiss, 1 Hill 275; People v. Lott, 21 Barb. 130; Humphrey v. Hathorn, 24 Barb. 278; Carpenter v. Doody, 1 Hilt. 465; Commonwealth v. Contner, 18 Pa. 439. But it is also held, that in declaring against a constable for failing to levy an execution, it is necessary to allege that the defendant in the execution had property on which the levy might have been made. The court say the officer was under no legal obligation to make the levy, unless the defendant had property at the time upon which to make it, and it was incumbent on the plaintiff to allege the fact in the declaration; and this correctly, for no such presumption exists on executions against property before levy, as on mesne process after arrest. State, use of Brooks v. Kirby, 6 Ark. 453.

(d) Dunphy v. People, 25 Mich. 10.

(e) Hurlock v. Reinhardt, 41 Tex. 580.

would bring at a forced sale,^(a) and not the amount agreed upon by the appraisers, as shown in the officer's return.^(b) The sheriff may show in mitigation of damages, that the defendant in the execution had no property upon which he could have levied,^(c) but *not* that the judgment is still collectible.^(d) And in such an action the sheriff may show in mitigation that other executions in his hands would have taken the proceeds of a sale.^(e) Where, in Ohio, the sheriff refused to levy on and sell under an execution in his hands, at the request of the plaintiff in the execution, certain personal property, which was wholly covered by mortgages to an amount far more than its value, it was held that there should be a verdict for nominal damages only.^(f) The measure of damages in an action against a sheriff, for not selling a tract of land levied on under the foreclosure, is said to be the value of the land or the amount of the foreclosure, whichever was the less amount.^(g)

§ 550. **Failure to attach.**—Attachments are governed by the same rule as executions, and if the sheriff, knowing of property enough to satisfy the demand, fails to levy to that extent, he is liable for the deficiency as ascertained by the result of the sale. It does not excuse him that the property levied on was appraised at a sum sufficient to satisfy the debt.^(h) In an action against the sheriff for neglect to levy an attachment, or levy and return an execution, the amount of the judgment or exe-

(a) *Harris v. Murfree*, 54 Ala. 161.

(b) *Parker v. Peabody*, 56 Vt. 221.

(c) *Abbot v. Gillespy*, 75 Ala. 180; *Ledyard v. Jones*, 7 N. Y. 550.

(d) *Ledyard v. Jones*, 7 N. Y. 550.

(e) *Forsyth v. Dickson*, 1 Grant 26.

(f) *Coe v. Peacock*, 14 Oh. St. 187; *Coopers v. Wolf*, 15 Oh. St. 523.

(g) *Baker v. Bower*, 44 Ga. 14; *Blackman v. Clements*, 45 Ga. 292.

(h) *Ransom v. Halcott*, 18 Barb. 56.

cution, or so much thereof as the value of the property which the officer neglected to attach would have been sufficient to satisfy, is the measure.^(a) And where the value of the property lost by the neglect of the sheriff to execute the attachment equals or exceeds the amount of the plaintiff's demand, such amount becomes the measure of damages for which the sheriff and his sureties are liable.^(b) So the damages should be reduced by the amount of property owned by the debtor at the time of the judgment, upon which the plaintiff might have levied.^(c)

In Connecticut, it was originally decided that an officer who had been guilty of neglect in not serving mesne process should be liable for the whole debt; a rule which has been there characterized "as one of stern policy, rather than of exact justice"; and it is now well settled that the plaintiff can only recover the damages he has sustained. "But these damages it is peculiarly the duty of the jury to assess, and in so doing they are not limited to any precise sum; they may even give more than the plaintiff's original debt. Where that debt has been lost by the wilful misconduct or negligence of the officer, they may add to it the costs of a second suit; and as the jury may give more than the debt, so they may give less. If it should be found by them that the failure of the officer to return a writ was owing to a mere mistake, in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nominal damages."¹

¹ *Palmer v. Gallup*, 16 Conn. 555; as to previous rule. *Gleason v. Ches- Duryee v. Webb*, cited in notes to this case. See *Clark v. Smith*, 9 Conn. 379, Day 195.

(a) *Perkins v. Pitman*, 34 N. H. 261; *Bowman v. Cornell*, 39 Barb. 69.

(b) *Smith v. Tooke*, 20 Tex. 750.

(c) *Townsend v. Libbey*, 70 Me. 162.

In North Carolina, in regard to mesne process, it has been said that the true inquiry is whether the debtor had any property which might, by due process, have been subject to execution, and whether the sheriff by his negligence has deprived the plaintiff of his remedy. But it is no answer for the sheriff to say that the debtor, even after being imprisoned, might pay, or secure to be paid by assignment, other *bona fide* debts, to the disappointment of the plaintiff.¹ Nor on such process is the reputation of the defendant as an insolvent any excuse; the officer is bound to ascertain for himself whether there is any property to satisfy the writ.²

§ 551. **Failure to arrest.**—Where the sheriff fails to take the debtor's body on execution, he may show in mitigation of damages the insolvency of the debtor.^(*) The actual loss must be proved.^(b) Where a constable, having received a writ, with directions to arrest the defendant named in it, returned it unexecuted, under a mistaken idea that he was entitled to indemnity, and the defendant remained publicly living in the State for some months, and the plaintiff might have issued another writ and arrested him, it was held, in Vermont, that these facts should have been submitted to the jury in mitigation of damages.^(c)

§ 552. **Escape.**—* In England, a remedy was originally given by statute, in an action of debt against the sheriff for the escape of prisoners charged in execution; and this statute has been re-enacted to some extent in this country. But under it no question could arise as to the

¹ *Sherrill v. Shuford*, 10 Ired. 200.

² *Parks v. Alexander*, 7 Ired. 412;
The State v. Edwards, 10 Ired. 242.

(*) *Dinninny v. Fay*, 38 Barb. 18.

(b) *Chapman v. Doherty*, 25 N. B. 271.

(c) *Blodgett v. Brattleboro*, 30 Vt. 579.

measure of damages ; for, the action being debt, and the provisions of the statute being peremptory, the officer was charged with the whole amount of the plaintiff's original claim, as ascertained by his judgment. Our present inquiry is directed to the measure of damages in the action on the case, or in trespass.¹ And the only remedy that now exists in England against a sheriff for escape on final process, is an action on the case for such damages as the plaintiff may have sustained by reason of such escape.²

When a prisoner for debt makes an escape³ (says Lord Kaimes), "the creditor is hurt in his interest, but sustains no actual damage ; for it is not certain that he could have recovered his money by detaining the debtor in prison, and it is possible he may yet recover it, notwithstanding the escape. But it is undoubtedly a hurt or prejudice to be deprived of his expectation to obtain payment by the imprisonment ; and the common law gives reparation by making the negligent jailor liable for the debt, precisely as equity doth in similar cases. A messenger who neglects to put a caption in execution, affords another instance of the same kind." This appears, Lord Kaimes observes, to be the infliction of uncertain consequential damage.**

§ 553. Value of custody the rule in England.—* In a case in England, the Court of Common Pleas said, that they had not been able to find any decision in which the rule as to the measure of damages was clearly defined. The principal case was one in which it was endeavored to reduce the liability of the sheriff by showing where an escape from final process had taken place, that the plaintiff

¹ *Bonafous v. Walker*, 2 T. R. 126 ;
Rawson v. Dole, 2 John. 454.

² *Prin. of Equity*, book i, ch. iv, § v,
ed. of 1767, p. 159.

³ 5 & 6 Vict. c. 93, § 31 ; *Arden v.*
Goodacre, 11 C. B. 371.

might, by diligence, have rearrested or detained the defendant, and recovered his debt. But this was denied ; and it was declared that the true measure of damages is the value of the custody of the debtor at the moment of the escape ;(*) that if, at the time of the escape, the debtor had not the means of satisfying the judgment, the plaintiff loses only the security of the debtor's body, and the damage may be small. If, on the other hand, at the time of the escape, the debtor could pay, and has wasted his means since then, it being clear that the loss of the debt is owing to the sheriff's neglect, the jury would be justified in giving the full amount of the execution.¹

But it is plain that this still leaves the whole subject at very loose ends. What is meant by the value of the security of the body of a debtor ? Are his physical and mental qualifications to be gone into, and the chance of his subsequently acquiring property, to be estimated ? Are the chances of his friends being induced or coerced, by reason of his imprisonment, into paying the debt, to be inquired of ? Again, what can be more vague than, in a matter of this kind, to say that "*the damages may be small.*" Nor, on the other hand, even if the debtor is solvent, is the liability of the sheriff to pay the debt declared as matter of law. It is simply said that the jury would be "*justified in giving the full amount of the execution.*" And the question on whom the burden of proof as to the debtor's pecuniary condition falls, is not alluded to.**

In a case in chancery, it was said that the burden was on the defendant to show that the loss was not the amount of the debt.(^b) In a late case in the Eng-

¹ Arden v. Goodacre, 11 C. B. 371.

(*) McRae v. Dunlop, 3 Russ. & Gel. 315.

(^b) Moore v. Moore, 25 Beav. 8.

lish Common Pleas, it was held that the jury might, in estimating the value of the custody, consider "the value to the plaintiff of the chance that the debt, or any part of it, would have been extracted by the debtor's remaining in prison," and the fact of an offer of the debtor's solicitor, some time before his arrest, to pay a certain amount in composition of his debts. (*)

§ 554. *American rule.*—* In an early case in New York, the facts were these. One Briggs had been master of the schooner *Friendship*, and had signed bills of lading for goods shipped at New York by Potter, the plaintiff, for account and risk of a West India house, to the amount of £1,655 9s. 3d. South Carolina currency. He also owed the plaintiff a balance of £129 11s. 3d. Briggs ran away with the goods, and never delivered them. Potter sued Briggs, and he was arrested on a *capias ad respondendum*, and after being in prison some time, escaped by the assistance of his friends. The sheriff made a special return to the writ, of a rescue: the plaintiff sued the sheriff in case for the escape and false return. It appeared on the trial that Briggs was very poor, and had no means of subsistence; and the defendant offered to prove that the plaintiff's attorney, after the escape, admitted Briggs "to be not worth a cent." This, however, was excluded. The judge charged that the facts did not justify the sheriff's return of a rescue; that the plaintiff had established a right of action, as well for the value of the goods shipped as for the balance of account; but that the jury were to decide the damages under all the circumstances; that the poverty of Briggs might be considered in mitigation, and if the return of the sheriff was fraudulently made, it would be an aggravation of damages. The jury, taking into consideration both the amount of the invoice

(*) *Macrae v. Clarke*, L. R. 1 C. P. 403.

and the balance of the account, found for the plaintiff \$3,000, which (as appears by the opinion of Livingston, J.) was about half the plaintiff's demand against Briggs. On motion for a new trial, the court held the declarations of the plaintiff's attorney rightly excluded. As to the rule of damages, Tompkins, J., said :

"It is impossible to determine whether the circumstance of the defendant having made a false return to the writ operated on the minds of the jury to increase the damages. The judge was perfectly correct in stating to them that the return was legally false. But I do not think that, even if the sheriff knew it to be so, it ought to aggravate the damages. The true question is, what has the plaintiff lost in consequence of this escape? The alleged false return by the sheriff, neither adds to nor diminishes the loss ; and therefore the solvency of Briggs, or his capacity to pay, must determine the quantum of damages sustained. If the circumstance of a false return be a substantive ground of damages, it would follow that where the person escaping was perfectly solvent, and the sheriff makes a false return, the creditor might recover in damages more than the full amount of his debt."¹

But a new trial was granted, on the ground that the plaintiff, the consignor, the goods being shipped for account and risk of the West India house, could not have recovered against Briggs, and in this opinion Kent, C. J., and Spencer, J., concurred. Livingston, J., and Thompson, J., who dissented as to the right of the consignor to bring the action, concurred in the rule of damages laid down as above by Tompkins, J. Thompson, J., said : "If the idea communicated to the jury was that they might give what is commonly called smart money, beyond the actual damage of the plaintiff, it was undoubtedly incorrect."²

¹ *Potter v. Lansing*, 1 Johns. 215.
Acc. Patterson v. Westervelt, 17 Wend.
543.

² In an early case, on an action of debt for escape, Spencer, J., said : "If an action on the case had been brought, it might have been inquired, what was lost by the escape, and the jury might

In another case in the same State,¹ the plaintiff had, on the second Monday of November, 1806, issued a *capias ad respondendum* to the defendant, sheriff of Rensselaer County, against one Abel Turner and others. Turner was arrested by the sheriff, and gave bond on the 5th of November, 1806, for the liberties of the jail, and admitted, when arrested, that he owed the plaintiff about \$800; and in November term, 1806, he confessed a judgment for \$871.36, docketed on the 30th December, 1806. He soon after escaped and went to Vermont. The defendant proved that in November, 1809, Abel Turner was again arrested, at the suit of the plaintiff, on his way to Vermont, and gave a cognovit for \$871.39, on which the plaintiff relinquished to him a tract of land in Vermont, which he had received as security, and which, a witness testified, was of more value than the debt, and the plaintiff gave him a receipt in full of all demands, except the suit in Rensselaer County. It was agreed that the execution was to be stayed for one year, and the plaintiff said he meant to charge the sheriff of Rensselaer County. The jury were instructed at the trial that the plaintiff ought not to recover more than the actual damages which he had sustained, of which they were to judge, and in the estimation of which they had a right to take into consideration all the circumstances. A verdict was given for six cents. On a motion for a new trial, it was insisted by the plaintiff that he was entitled to recover the whole sum due him in the original action.

Thompson, J., delivering the opinion, said :

“ The question is, whether it was competent for the sheriff to

have given such damages as they supposed the party had sustained.” But in an action of debt, it was held that every inquiry of that kind was improper, the statute having fixed the extent of the sheriff's liability, that is, for the original

debt and damages recovered; and the plaintiff was confined to the precise amount of his original judgment and costs. *Rawson v. Dole*, 2 Johns. 454.

¹ *Russell v. Turner*, 7 Johns. 189.

show that the plaintiff had, after he knew of the escape, relinquished to the prisoner real security for the debt, which he held in the State of Vermont, with a view to recover his demand from the sheriff. The true question in cases of this kind is, what has the plaintiff lost in consequence of the escape? The jury are not confined to the exact damages in the final judgment, or to the amount of the plaintiff's demand, but have a power and discretion to assess such damages as they shall suppose the plaintiff has sustained under all circumstances.

"The value and extent of this security was a proper subject for the consideration of the jury, and could the plaintiff have shown it to be worth little or nothing, it would not have mitigated the damages. As the testimony, however, appeared before the jury, it was sufficient to pay the plaintiff's demand. It was admitted by the plaintiff's counsel, and, indeed, could not be denied, that the insolvency of the prisoner, or payment of the demand by him, could be given in evidence in mitigation of damages. On what principle could this be done? None other, certainly, than to show how far the plaintiff had been or was likely to be damnified. If the prisoner had deposited with the plaintiff a sum of money to satisfy his demand when ascertained by judgment, and the plaintiff, on discovering that an escape had been made, had surrendered up the money, could it be doubted that the sheriff might avail himself of it in mitigation of damages? Or, suppose the suit upon a bond which was secured by mortgage on real property, and the creditor on discovering the escape should discharge the mortgage, would not this circumstance be admissible in mitigation of damages? All these cases depend on the same principle, and necessarily result from the nature of the action, which is given to the plaintiff by way of indemnity for the actual injury which he sustains by reason of the escape; and the plaintiff ought not to be permitted to avail himself of his own acts or misconduct to enhance the damages."

Again,¹ where suit was brought by the plaintiff as assignee of the sheriff, on a bail bond, given by the defendants, conditioned that one Brown should keep the liberties, etc., the plaintiff proved his judgment and escape. The defendant proved that Brown was insolvent,

¹ Kellogg v. Manro, 9 Johns. 300.

and only possessed a cow worth sixteen dollars. The judge directed the jury to find a verdict for the plaintiff for sixteen dollars, the value of the cow, which was done. There were cross-motions in arrest of judgment and for a new trial. Both motions were denied; the court saying: "The plaintiff is entitled, *prima facie*, to recover his whole debt which is presumed to be lost by the escape; and it could only have been reduced down to the sum found by the verdict, upon the evidence given, that if the party had not escaped there was no ground to consider that any greater sum could have been recovered of the original defendant, by the coercion of confinement." **

But in New York, where one was arrested on a precept of the surrogate's court for failure to account, and was suffered to escape, the measure of damages under the Code was held to be the sum awarded by the surrogate's decree, with interest, and the insolvency of the delinquent could not be shown in mitigation. (*)

* In Vermont the rule seems stringent, though the action on the case is resorted to. It has long been well understood and universally recognized in that State, that an officer who holds penal process against a debtor upon whom he may serve it, but who omits to do so, or having once had an opportunity to arrest the debtor, neglects to do it, and the debtor afterwards absconds, becomes *fixed with the debt*; and, of course, no evidence as to the debtor's insolvency is admissible.¹ So, in the same State, in an action against the sheriff for the escape of the debtor from the liberties of the jail, he having taken insufficient security, the rule

¹ Goodrich v. Starr, 18 Vt. 222.

(*) Dunford v. Weaver, 84 N. Y. 445.

of damages is the amount of the debt.¹ ** So, in Connecticut, in the sheriff's action for an escape on the security taken by him for the jail liberties, the rule is the debt and costs on the execution with interest.^(*) So it is held that if the marshal fail to bring in the body of the defendant on the return of the writ, he will be amerced in the full amount of the debt or damages and costs.^(b)

So, in North Carolina, where the remedy of debt is given by statute against the sheriff who shall wilfully or negligently suffer a debtor charged in execution to escape; it has been held that the sheriff is fixed with the debt.² But the general rule appears to be otherwise. In debt, on a sheriff's bond for an escape, where the sheriff's return was, "The defendant arrested; signed the appearance bond; refused to give surety; and made his escape by jumping on his horse and running, there being no one present to assist," the measure of damages was recently held to be, not the debt and interest, but such actual damages as the plaintiff had sustained.^(c)

In Arkansas, also, it has been held, that in actions for escape from mesne process, the presumption is that the plaintiff lost the entire debt by the escape; and the measure of damages against the officer is the amount of the original debt; but the defendant is at liberty to prove in mitigation of damages that the debt could not have been made out of the debtor,³ and the same is the rule in Maryland.^(d)

¹ *Wheeler v. Pettes*, 21 Vt. 398. See, refusing to assign a jail bond to the creditor, in the same State, *Vilas v. Barker*, 20 Vt. 603, an action against a sheriff for

² *Adams v. Turrentine*, 8 Ired. 147.

³ *Faulkner v. Bartley*, 6 Ark. 150.

(*) *Seymour v. Harvey*, 8 Conn. 63.

(b) *Winter v. Simonton*, 2 D. C. (2 Cr. C. C.) 585.

(c) *State v. Falls*, 63 N. C. 188.

(d) *State v. Baden*, 11 Md. 317.

In Georgia, in an action of debt upon the sheriff's official bond for an escape on mesne process, it has been held that the insolvency of the original debtor may be given in evidence by the defendant in mitigation of damages.¹

In Massachusetts, it has been said, that in actions of this kind, "It is peculiarly the right of the jury to assess the damages, and in this they are not restricted to any precise sum."² And so again, "that the jury have the subject of damages at their discretion."³ But notwithstanding this general language, the rule appears settled there in conformity with that in New York, namely, that the amount of the plaintiff's debt is, *prima facie*, the measure of damages;⁴ that it is competent for the defendant to show, in mitigation of damages, any circumstances which go to prove that the plaintiff has, in truth, not suffered any actual injury from the loss complained of,⁵ and that, on the other hand, it is competent, if the wrong be a wilful one, for the jury to give more than the actual loss.⁶ But in *Chase v. Keyes*,^(*) an action on the case founded upon the statute giving the plaintiff "such damages as he shall have suffered," it was held, that the plaintiff must prove his loss, and the measure of damages was not even *prima facie* the amount of the debt.

The Supreme Court of Ohio says:

"In this country the following rules seem now to be settled by the preponderating weight of authority: 1. On proving the judgment, arrest, and escape, the plaintiff is *prima facie* entitled to

¹ *Crawford v. Andrews*, 6 Ga. 244.

² *Weld v. Bartlett*, 10 Mass. 470; and *Colby v. Sampson*, 5 Mass. 310.

³ *Rich v. Bell*, 16 Mass. 294. See, also, *Burrell v. Lithgow*, 2 Mass. 526.

⁴ *Young v. Hosmer*, 11 Mass. 89; *Porter v. Sayward*, 7 Mass. 377.

⁵ *Brooks v. Hoyt*, 6 Pick. 468; *Shak-*

ford v. Goodwin, 13 Mass. 187; *Nye v. Smith*, 11 Mass. 188.

⁶ *Weld v. Bartlett*, 10 Mass. 470.

Though in this case it was intimated that the limit of the discretion of the jury, even in case of wilful wrong, is merely "expenses and costs not taxable." See, also, *Selfridge v. Lithgow*, 2 Mass. 374.

(*) 2 Gray 214.

recover the whole amount of his debt. 2. To reduce the recovery below the amount of the debt due from the escaping prisoner, the *onus probandi* rests upon the defendant. 3. For this purpose the defendant may not show that the amount of the debt is still capable of being collected from the escaped prisoner, but may show his partial or total insolvency or pecuniary worthlessness at the time of the escape. 4. That on proving judgment, arrest, and escape, the plaintiff in all cases is entitled to recover at least nominal damages. 5. Where the jury find the escape to have been not only voluntary on the part of the officer, but that in permitting the same he was actuated by fraud, malice, or corruption, they are not restricted to the amount of pecuniary injury actually sustained, and may include reasonable exemplary damages, but with this exception; where evidence in mitigation is given, the actual injury sustained is the proper measure of recovery."

The true measure of damages is the value of the custody at the moment of the escape. That value must depend on the circumstances of each case. If a party is in custody on process for contempt, and is to be held in custody only till he pay a pecuniary fine, and is utterly insolvent, the damages must be merely nominal. If he is ordered to stand committed till he perform a specified act which he has the power to perform, the value of the custody must depend on the nature of the act, and the consequences to the aggrieved party of a failure to secure its performance.^(*) In the case of *Jenkins v. Troutman*,^(b) the court, while again recognizing the rule of mitigation already acquiesced in, in that State,^(c) by allowing the defendant to show that the effect of his wrongful act was not so great because the escaped debtor could not pay the debt, or any part of it, rejected as irrelevant, proof that the defendant was "largely indebted,"

(*) *Hootman v. Shriner*, 15 Oh. St. 43.

(b) 7 Jones L. 169.

(c) *Murphy v. Troutman*, 5 Jones L. 379.

which was offered with a view to establish the probability that the debtor would, if arrested, have assigned his property to secure the payment of those debts, thereby diminishing the plaintiff's chances of satisfaction. So, in the case of *Sherrill v. Shuford*,^(*) the court say: "The true inquiry is, has the defendant, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debt? If he has, and the debtor had property which might by due process have been subject to it, he shall answer to the full amount of the debt." Where, however, a defendant is arrested by the sheriff, and gives bail, and is discharged, but the bail do not justify, the sheriff becomes bail, and is liable to the same extent to which the bail would have been had they justified. In such case, therefore, after the return of the execution unsatisfied, the sheriff is liable for the judgment and interest, and the insolvency of the judgment debtor will not go in mitigation of the damages.^(b) In an action against a former sheriff, as for an escape, on the ground of his neglect to assign over at the end of his term to his successor in office a debtor taken in execution, who is on the jail limits, the plaintiff's omission to cause the prisoner to be retaken, by issuing a new execution, may be considered in mitigation of the damages.^(c)

Where the escape was from an arrest upon mesne process, the plaintiff in order to recover must show the validity of the debt;^(d) and if it was outlawed he can recover only nominal damages.^(e) Where after an escape the sheriff rearrests the judgment debtor and holds

(*) 10 Ired. 200.

(b) *Metcalf v. Stryker*, 31 N. Y. 255; *Bensel v. Lynch*, 44 N. Y. 162.

(c) *French v. Willet*, 10 Bosw. 566.

(d) *Lewis v. Morland*, 2 B. & Ald. 56; *Scott v. Henley*, 1 M. & Rob. 227.

(e) *Slocum v. Riley*, 145 Mass. 370.

him on the old execution, the plaintiff can recover only such expenses as the escape caused him. (*)

§ 555. *Insufficient bail or surety.*—In an action on the case, brought against a sheriff for not taking sufficient bail, the principal debtor being sued to judgment and the execution returned unsatisfied, this language was held: “Although the amount of the judgment is *prima facie* evidence of the measure of damages, yet this may be controlled by evidence showing the entire inability of the debtor to pay, and the actual injury therefrom to be less than the amount of the judgment against him.” And although the principal debtors had left the State, and could not be found on the execution, evidence as to their poverty was held admissible, the court saying: “The fact that the principal debtors were out of the commonwealth, and could not be arrested on execution, may be important in its bearing upon the amount of damages sustained by the default of the sheriff, but it does not affect the general rule of damages, or the competency of evidence tending to show the entire inability of the debtor to satisfy the demand. In all actions on the case, the question is, what is the amount of damages sustained?”¹ So in an action on the case against the sheriff, for taking insufficient bail, it is competent for the defendant to prove, in mitigation of damages, the inability of the original debtor to pay the judgment which has been obtained against him in the suit upon which he was arrested. The true measure of damages is the injury actually sustained by the judgment creditor; and, therefore, evidence tending to show that the debtor was poor or insolvent, so that his arrest on execution would not

¹ *West v. Rice*, 9 Met. 564.

(*) *State v. Newcomer*, 109 Ind. 243; *State v. Caldwell*, 115 Ind. 6.

have enabled the creditor to realize his debt, also tends to prove that the plaintiff suffered no essential injury by the negligence of the officer.^(*) It is a general principle that, in an action against a sheriff for taking insufficient sureties, no more can be recovered against him than the party could have recovered against sufficient sureties.¹ ^(b) And in an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage, beyond the limits of the bond, the expenses of a fruitless action against the pledgees, unless he gave the sheriff notice of his intention to sue them.²

Where the sheriff took an informal replevin bond, and the defendant in replevin had judgment for a return, the measure of his damages in an action against the sheriff is the value of the goods at the time of taking, with interest ; ^(c) and he may also recover the costs and expenses of the replevin suit, and of a fruitless action on the bond ; but his recovery is limited to the penalty of the bond.^(d) But if the goods were the property of the plaintiff in replevin, and the defendant in replevin had no right to a return, he can recover only nominal damages from the sheriff.^(e)

§ 556. *Failure to return.*—In an action brought against a sheriff for neglecting to return a *fi. fa.*, an omission of duty for which the Revised Statutes of New York de-

¹ *Yea v. Lethbridge*, 4 T. R. 433 ; *Evans v. Brander*, 2 H. Bl. 547. By this, *Concanen v. Lethbridge*, 2 H. Bl. 36, was overruled. See, also, *Jeffery v. Bastard*, 4 A. & E. 823. ² *Baker v. Garratt*, 3 Bing. 56. See *Gibbs v. Bull*, 20 Johns. 212, a suit for taking insufficient pledges in replevin.

(*) *Danforth v. Pratt*, 9 Cush. 318.

(b) *Carter v. Duggan*, 144 Mass. 32 ; *Mortland v. Smith*, 32 Mo. 225.

(c) *O'Grady v. Keyes*, 1 All. 284.

(d) *Norman v. Hope*, 13 Ont. 556 ; 14 Ont. 287.

(e) *Case v. Babbitt*, 16 Gray 278.

clared that the officer shall be liable for *the damages sustained* by any party aggrieved, the measure of damages was held to be the amount of the execution, subject, however, to mitigation upon showing that the whole or any part of it could not be collected.^(*) But in Illinois, in actions upon the official bond of a constable for failure to return an execution, the measure of damages is the amount of the execution, with interest from the date of the judgment on which it was issued, notwithstanding the defendant in the execution was wholly insolvent from the time of its issue to that of its return.¹ For refusal to hand over a bail bond, the measure of damages is the amount the bail must pay, which might be reduced by proof of the insolvency of the bail,^(b) but not of the debtor.^(c) For failure to return an order of sale of mortgaged property, the measure of damages is the actual value of the property.^(d) For failure to hand over to the plaintiff in replevin the goods replevied, the measure of damages would ordinarily be the value of the goods; but the defendant may show that the plaintiff was not in fact entitled to the goods.^(e)

§ 557. *False return.*—For a false return of *nulla bona*, the measure of damages is the value of the property which the plaintiff would have been enabled to apply in satisfaction of the execution.^(f) Where there is prop-

¹ *Robertson v. County Com'rs*, 10 Ill. 559. This decision is founded on the statute of that State.

(*) *Ledyard v. Jones*, 7 N. Y. 550, modifying or confirming the earlier cases; *Hinman v. Borden*, 10 Wend. 367; *Stevens v. Rowe*, 3 Den. 327; *Persons v. Parker*, 3 Barb. 249; *Dolson v. Saxton*, 11 Hun 565.

(b) *Bradt v. Holden*, 12 R. I. 335.

(c) *Seeley v. Brown*, 14 Pick. 177; *Bradt v. Holden*, 12 R. I. 335.

(d) *Boyd v. Desmond*, 79 Cal. 250.

(e) *Robinson v. Shirreff*, 25 N. B. 68.

(f) *Thayer v. Roberts*, 44 Me. 247.

erty enough to satisfy the amount directed to be collected on the execution, that amount, with interest, is the measure. The sheriff may show, in mitigation, that there was not property enough to satisfy the demand, or that it would have been absorbed by prior executions, but not that the amount directed to be levied was not due on the judgment.^(a) In Ireland, for a false return of *non est inventus*, the analogy of escapes was followed, and the value of the custody was said to be the rule.^(b) And in *Beckford v. Montague*,¹ case for a false return of mesne process, the original defendant being still within the reach of process, Lord Kenyon told the jury that they were not called on to give the plaintiff the whole extent of the debt, if the original debtor was still solvent. In Massachusetts, where a sheriff returned to the original writ that he had taken bail, and then refused to deliver the bail-bond, the fact being that no bail had been taken, he was not permitted to show in mitigation that the original defendant was insolvent.² *Pelham v. Way*^(c) was an action against a U. S. marshal for a false return, in returning that he had taken a note. In fact he had not taken the note, but had sold the debt of which the note was evidence. It was held that the plaintiff could only recover nominal damages, for the sale of the debt had not injured him, as it did not extinguish the note or the debt, for the libel under which the return was made was not against the debt. Where suit is brought against a

¹ 2 Esp. 475; see also *White v. Jones*, 5 Esp. 160.

² *Simmons v. Bradford*, 15 Mass. 82. In Indiana, by statute, in case of a false return to a writ of *feri facias*, the constable and his sureties are liable on

the bond for the full amount which the officer might have collected and paid over, with interest and ten per cent. damages. R. S. 1881, § 784; *Limpus v. The State*, 7 Blackf. 43.

(a) *Bacon v. Cropsey*, 7 N. Y. 195; *Forsyth v. Dickson*, 1 Grant 26.

(b) *Cahill v. Verner*, 2 Ir. C. L. 549.

(c) 15 Wall. 196.

sheriff for a false return of *nulla bona* to an execution, it seems that an inquisition finding the property out of the original defendant is a bar to the action; but in a suit against the officer in trespass by the true owner, an inquisition finding the other way is only to be received in mitigation.¹

§ 558. **Miscellaneous breaches of duty.**—It has been held in Maine, in a suit against a sheriff for not safely keeping property attached on mesne process, that the plaintiff was entitled to recover the full value of the property seized, and that the damages could not be mitigated by deducting the expenses which would have necessarily attended the keeping, had it been kept safely.² So where one had purchased certain premises on the foreclosure of a mortgage, executed to him by the occupants, and the sheriff neglected for two days to execute a writ of assistance, placed in his hands to put the purchaser in possession, and in the intervening time the occupants greatly injured the premises, the sheriff was held liable for the damage thus sustained. Called on to discharge a duty which the law enjoined of giving possession of property which could only be obtained through such official action by him, it was considered by the court just and legal that he should be held responsible to the full extent of the injury.^(a) So where, through the negligence of the officer, a slave arrested by him for a criminal offense, escaped and was drowned, the damages recoverable by the plaintiff, who had but a life estate in the slave, was limited to the value of such estate.^(b) In New York, it has been

¹ Bayley v. Bates, 8 Johns. 185; Roberts v. Thomas, 6 T. R. 88; Wells Townsend v. Phillips, 10 Johns. 98; v. Pickman, 7 T. R. 174, 177.
Farr v. Newman, 4 T. R. 621, 633, 648; ² Lovejoy v. Hutchins, 23 Me. 272;
acc. Tyler v. Ulmer, 12 Mass. 163.³

(a) Chapman v. Thornburgh, 17 Cal. 87.

(b) Tudor v. Lewis, 3 Met. (Ky.) 378.

held that where the sheriff so negligently conducts himself in regard to personal property levied on that it is lost, and in consequence the real estate of the defendant is sold, and the security of a mortgage creditor is impaired, no action lies by such mortgage creditor against the sheriff, unless the conduct of the sheriff be explicitly charged to be *fraudulent and with intent* to diminish the security of the mortgage creditors.¹ It is held in Indiana, that, on a sale of land in execution, the sheriff is bound to tender a deed to the purchaser; and where, without doing so, he resells for omission of the purchaser to pay the purchase-money, the sheriff is himself liable to the execution defendant for the amount of the difference between the two sales.^(*) Where a sheriff, without the direction of the creditors, made sales of property on credit, on some of which sales he received interest before the return day of the executions, and on others, the purchasers proved insolvent, he was held bound to account to the creditors, on the executions, to the full amount of the sales, but not for the interest.^(b) And where the sheriff having levied on sufficient property, it is wrongfully replevied, and he without excuse neglects to prosecute the sureties in the replevin bond, he will not be allowed his expenses in the replevin suit, though they are within the terms of the bond to indemnify him.^(c)

§ 559. Magistrate.—Where a judicial officer is acting ministerially, he is liable for the damage directly resulting from his negligence. In such case, the rules of liability and mitigation are the same with those applicable to ministerial officers. And a magistrate liable for the damages

¹ *Bank of Rome v. Mott*, 17 Wend. 554. See *Yates v. Joyce*, 11 Johns. 136.

(*) *State v. Lines*, 4 Ind. 351.

(b) *Chase v. Monroe*, 30 N. H. 427.

(c) *Swezey v. Lott*, 21 N. Y. 481.

directly resulting from his negligence in issuing an irregular or invalid execution, may, in an action brought for the recovery of such damage, show that the judgment debtor had no property, and that the debt could not have been collected on a valid execution.^(*) And the same decision was reached in an action against a justice of the peace for neglecting to issue an execution.^(b) In California, where, because of a defect in a notary's certificate of acknowledgment to a mortgage, it was held not to import notice to subsequent incumbrancers, and the lien of the plaintiff's mortgage was in consequence postponed to that of a later one, and his debt thereby lost, in an action by the mortgagee against the notary on his official bond, the plaintiff was held entitled to recover the mortgage debt and interest.^(c)

§ 560. **County clerk.**—In an action in New York against a county clerk, who, by statute in that State (Laws 1853, ch. 142), was made liable for all damages for mistakes in searches made by him in his office, it appeared that in a search made by him at the request of an attorney who had been employed to examine the title to a house and lot belonging to the plaintiff's intestate, and paid by the plaintiff, a judgment of about twenty-seven dollars, which was a lien on the premises, had been omitted. The examination of the title was made for the purpose of procuring a loan by mortgage on the property. The money was obtained and applied, as far as necessary, to the satisfaction of such liens as were returned on the search. It was more than enough to satisfy them and

(*) *Noxon v. Hill*, 2 All. 215.

(b) *Carpenter v. Warner*, 38 Oh. St. 416; *Gaylor v. Hunt*, 23 Oh. St. 255.

(c) *Fogarty v. Finlay*, 10 Cal. 239. It should be mentioned that by statute the notary was liable on his official bond to parties injured by his official misconduct for "all damages sustained."

also the omitted judgment. The premises, which were worth \$6,000, were afterwards sold on an execution on that judgment, and were bought in by the plaintiff in the execution for \$60. By a compromise arrangement, in consideration of \$400, he conveyed the premises to the plaintiff as executor and trustee of the deceased owner. In a judgment, which was affirmed by the Court of Appeals, the county clerk was held not responsible for the loss sustained, as it was directly caused by the non-payment of the judgment, and not by his omission.^(*)

§ 561. *Treasurer.*—In *McHaney v. Trustees*,^(b) it appeared that a note with two sureties came into the hands of the defendant as county treasurer. The principal died. In an action on his official bond for his failure to present the note for payment against the estate, it was held that, as there was no evidence to show that, if it had been presented, it would have been paid, or that the sureties were insolvent, only nominal damages could be recovered.

§ 562. *Town officers.*—In an action against the supervisors of a town for refusing to place on the tax list two judgments recovered against the town, evidence was admitted to show that, subsequently to the commencement of this action, one of the judgments had been placed on the tax list, and it was held that, such being the case, the defendants were not liable for the whole amount of the plaintiff's judgments. It was also said that, such being the case, it was proper to instruct the jury that the plaintiff could only recover nominal damages where he failed to show any special injury, Clifford, J., dissenting, and holding that the plaintiff was entitled to recover the actual damage sustained in view of the whole evidence.^(c)

(*) *Kimball v. Connolly*, 3 *Keyes* 57.

(b) 68 Ill. 140.

(c) *Dow v. Humbert*, 91 U. S. 294.

In such an action a plaintiff can recover the expenses incurred in the employment of counsel.^(*) In an action against the supervisor of a town for refusing to present to the board of supervisors of the county a reassessment of damages in the plaintiff's favor, the plaintiff can recover the amount of the reassessment, with interest, and he can recover the full interest, although he might have gone before another board and thus reduced the damage, the court saying, that he was not obliged to go before another board.^(b) Where it was made the duty of a town by statute to make good to a purchaser of land at a tax sale all damages by reason of the collector's neglect, in an action for such neglect, the measure was held to be, not the value of the land, but the amount paid and interest.^(c) Where selectmen wrongfully but in good faith refused to allow plaintiff to vote, exemplary damages were refused.^(d)

§ 563. *Collector of customs.*—*In an action against a collector of customs, for refusing to sign a bill of entry for landing a cargo of foreign wheat, in consequence of which the plaintiff was obliged to pay duty on it when, in fact, no duty was by law payable, the proper measure of damages has been held, by the King's Bench in England, to be, not merely the amount of duties paid, but the amount of loss sustained by the plaintiff in consequence of a subsequent fall in the price of the article.¹

In an action by the United States against a collector on his official bond, for not returning paid treasury notes to the proper department at Washington, it has been held that the rule of damages would be the amount of the

¹ *Barrow v. Arnaud*, 8 Q. B. 595; 10 Jur. 319.

(*) *Newark Savings Inst. v. Panhorst*, 7 Biss. 99.

(b) *Clark v. Miller*, 54 N. Y. 528.

(c) *Saulters v. Victory*, 35 Vt. 351.

(d) *Pierce v. Getchell*, 76 Me. 216.

notes, unless it was shown that they were cancelled, and that the United States had suffered, or was likely to suffer, less than their amount ; and that the jury were to take into consideration the amount of damage, from the risk of the notes getting into circulation again ; from the delay and inconvenience in obtaining vouchers to settle the accounts ; and from the want of evidence at the department that the notes had been redeemed.¹ **

* Where trespass was brought against the collector of customs for New York,² for illegally seizing the plaintiff's vessel, it appeared that she was seized on the 2d October, 1801, and retained in custody till the 25th August, 1802, when she was restored. Six months before the seizure, the plaintiff had purchased her for \$12,474 ; and the day previous to the trespass, he made a contract to sell her for \$9,500. On the 2d September, 1802, eight days after her restoration, she was finally sold at public sale for \$4,288 ; the plaintiff claimed the sum of \$9,500 (the contract price), with interest and marshal's fees deducting the price actually obtained at the sale, \$4,288 ; and this was held right by the Supreme Court of New York. This recognizes the principle that where an actual bargain is interfered with by the defendant's tortious act, he shall be made responsible for the loss sustained. It is not a case of mere contingent damages or speculative profits ; it is an actual contract broken up by an unauthorized act. **

§ 564. **Trespass by officer.**—* We have been examining cases where the public officer is charged with neglect in not executing process confided to him. There is another large class of cases, where the complaint is that he has overstepped his powers, and abused the process of the court. In these cases we shall find, that where the acts of public officers are illegal, they are very narrowly

¹ U. S. v. Morgan, 11 How. 154.

² Woodham v. Gelston, 1 Johns. 134.

watched, and often, by the infliction of vindictive damages, severely punished for the abuse of their trust; so, where trespass was brought for breaking and entering the plaintiff's house, and taking his goods, it appearing that judgment had been obtained in a court of local jurisdiction, and that execution was illegally levied on property of the plaintiff *out* of the jurisdiction, it was held that the plaintiff was entitled to recover the amount paid by him to release the levy. It was insisted that, as the plaintiff clearly owed the debt, this rule could not apply. But Lord Denman, C. J., said: "A person who takes upon himself to extort money by an authority which he does not possess, must repay the money which he raises thereby." And Patterson, J., said: "I am afraid of admitting the principle contended for, that where money has been extorted by means of an illegal authority, the measure of damages is to be merely the amount of injury actually sustained."¹ (*) ** Where the sheriff unlawfully executed a search warrant, it was held that the plaintiff might recover for his sense of humiliation.^(b)

* So, in a case, where the defendants, under color of process, illegally broke into the plaintiff's house to levy an execution, and the plaintiff paid the amount due on the writ, under protest, to induce the defendants to withdraw, the jury gave the amount so paid and £500 besides, as damages; a motion was made to reduce the damages; but the court said: "The trespasses were of a very serious nature, having been committed by officers of the law, under color of the law, breaking open the outer door with great violence. Such conduct is calculated to lead to dangerous conflicts; and the proper amount of damages

¹ Sowell v. Champion, 2 Nev. & P. 627; 6 A. & E. 407.

(*) Acc. Von Storch v. Winslow, 13 R. I. 23.

(b) Melcher v. Scruggs, 72 Mo. 406.

must depend so much on the general circumstances, that it is very difficult to discover any standard by which to measure the amount ; much must be left to the discretion of the jury." ¹ So, in an action of trespass *de bonis asportatis*, for an illegal levy, it was held, "that the jury might give vindictive damages, if they should find that the trespass was committed maliciously, and in a wanton and aggravated manner, and with a design to vex and injure the plaintiff." ² (*) **

But exemplary damages can, of course, only be given for aggravated trespass. A case in Pennsylvania illustrates this. ³ * It was trespass against the defendants for a levy upon certain horses claimed by plaintiff under an execution against a third party ; and it appeared that the latter had made a conditional purchase of the horses from the plaintiff, whose property they were to remain till fully paid for. Part had been paid. The court told the jury "to find for the plaintiff the value of the property taken, and interest, and such further amount as, under all the circumstances of the case, as argued by the counsel before you, you may think him entitled to demand, if any." But, on error, this was held wrong :

"From this instruction," said the Supreme Court, "we entirely dissent. It appears in evidence that the vendee had paid at least part of the price, and, so far as it appears to us, a considerable part of it. The vendor and vendee stand, therefore, in this position at the time of seizure and sale : the vendor had the legal title, the vendee an equity to the amount he had paid. But, by the instruction of the court, the vendor recovers not only the value of his own interest, but the interest of the vendee also. Now, this cannot be ; for the only just rule of compensation will be to remunerate him for the amount of injury he has

¹ Duke of Brunswick v. Sloman, 8 C. B. 317.

² Huntley v. Bacon, 15 Conn. 267, 273.

³ Rose v. Story, 1 Pa. St. 190.

(*) *Acc. Rodgers v. Ferguson*, 32 Tex. 533 ; 36 Tex. 544.

sustained, which is commensurate with his interest in the chattel. Beyond that, upon no principle of law or equity is the jury permitted to go, unless in cases of gross oppression or aggravation, when the jury may mulct a party with vindictive damages. But this is a case for compensatory, and not vindictive damages, as clearly appears from the evidence. We also think that the latter part of the instruction is highly objectionable. The court allows the jury to give such further damages as, under all the circumstances of the case as argued by the counsel, they might think them entitled to demand. This is giving them a discretionary power, without stint or limit, highly dangerous to the rights of the defendant; it is leaving them without any rule whatever. The rights of the defendant are made to depend on the arbitrary will of the jury, of the effects of which this verdict presents a warning example. Nothing appears which should swell the damages beyond the value of the interest which the vendee had in the property sold by the constable." **

§ 565. **Wrongful attachment.**—In an action for the illegal seizure of goods, if there be no circumstances of aggravation, the measure of damages is the value of the goods, with interest from the time of the taking to that of the trial.^(*) So in Vermont, in an action brought against an officer who had attached the plaintiff's goods, it has been said: "That no case can be found where damages have been given for trespass to *personal property*, when no unlawful intent or disturbance of a right or possession is shown, and where not only all *probable* but all *possible* damage is expressly disproved."¹ So in an action on the sheriff's official bond, for the conversion of notes taken by him for property sold on partition, the measure is the value of the notes.^(b) Where the

¹ Paul v. Slason, 22 Vt. 231.

(*) Brasher v. Holtz, 12 Col. 201; Cornforth v. Maguire, 12 Col. 432; Dow v. Julien, 32 Kas. 576; Wanamaker v. Bowes, 36 Md. 42; Mitchell v. Stetson, 7 Cush. 435; Parker v. Conner, 44 N. Y. Super. Ct. 416; Erwin v. Bowman, 51 Tex. 513; Willis v. Whitsitt, 67 Tex. 673.

(b) Brobst v. Skillen, 16 Oh. St. 382.

goods are returned, the measure of damages is their deterioration in value,^(*) and the expense of securing a return.^(b) Where goods are illegally seized by the sheriff *in transitu*, the measure of damages is analogous to that in the case of a carrier failing to deliver, and is said to be their value at the place of destination, deducting the necessary expenses of transportation thither.^(c) The sheriff has no ground for objection in an action against him for a wrongful attachment by his deputy, to an instruction to the jury that the plaintiff is entitled to recover the value of such property exempt from attachment as was attached and thereby wholly lost to him, with interest from the time of the attachment. And if the plaintiff thereby lost the temporary use only of such property, or of the property of other persons, to the use of which he was entitled, then he should recover for the injury from such loss of use. Where attached property was kept in the plaintiff's barn, it was held that if the custody of it had been such as wholly or partially to exclude him from the barn, he was entitled to indemnity for such loss of the use of the barn, so far as it was not occupied by the attached property. But where the plaintiff occupied such barn under a lease, in which he had covenanted to "spend or consume all the hay or other fodder on the premises" produced thereon during the term, he could not recover from the sheriff, who wrongfully executed an attachment obtained by the lessor, damages for being disabled from the fulfilment of

(*) *Patton v. Garrett*, 37 Ark. 605; *Holton v. Taylor*, 80 Ga. 508; *MacVeagh v. Bailey*, 29 Ill. App. 606; *Lowenstein v. Monroe*, 55 Ia. 82; *Sanford v. Willetts*, 29 Kas. 647; *Dow v. Julien*, 32 Kas. 576; *Dodson v. Cooper*, 37 Kas. 346.

(b) *Holton v. Taylor*, 80 Ga. 508; *Sanford v. Willetts*, 29 Kas. 647; *Dow v. Julien*, 32 Kas. 576; *Dodson v. Cooper*, 37 Kas. 346.

(c) *Eby v. Schumacher*, 29 Pa. 40.

this covenant, since the plaintiff could not be answerable to his lessor, who caused the attachment, for not performing the covenant.^(*) And where a sheriff, under color of an attachment, had seized the plaintiff's books of account and returned them as attached in a suit against another person, in consequence of which they were delivered to that person's receiver, who collected the accounts, the measure of damages was held to be the amount collected, with interest from the time of the collection.^(b) Interest on the value of the property taken by the sheriff, from the time it was taken until its restitution, and reasonable compensation for the depreciation in its value, if any there was, is the legal compensation in a case free from malice or vexatiousness on the part of the officer.^(c) And where there is no restitution, in accordance with the American doctrine as to interest, it should be added to the amount of the debt or the value of the property.^(d) A mortgagee of personal property recovers the value of the goods taken, with interest, up to the amount of the mortgage.^(e) In trespass brought by the assignee of a mortgage of personal property, against an officer for taking the property on an execution against the mortgagor, and holding it till the assignee paid the execution and officer's fees, the measure of damages is the amount paid and interest, besides a reasonable compensation for the taking and detention.^(f)

In an action against the sheriff for wrongful seizure of goods, their retail value cannot be given in evidence, as

(*) *Clapp v. Thomas*, 7 All. 188.

(b) *Woodborne v. Scarborough*, 20 Oh. St. 57.

(c) *Beveridge v. Welch*, 7 Wis. 465.

(d) *Hessing v. McClosky*, 37 Ill. 341.

(e) *Slifer v. State*, 114 Ind. 291; *Crawford v. Nolan*, 72 Ia. 673; *Becker v. Dunham*, 27 Minn. 32; § 82.

(f) *Carpenter v. Cummings*, 40 N. H. 158.

it includes profits ; and damages to the plaintiff's business from such seizure are not to be taken into account ;^(a) but damages may be recovered for detention of goods kept for sale until the season for sale is lost.^(b) In an action of replevin against a sheriff, damages sustained from depositing a sum of money with a third party to induce him to become surety in the replevin bond, are altogether too remote and consequential to be considered.^(c) In Mississippi the damages for wrongful attachment are declared by statute to be attorney's fees, hotel bills, travelling expenses, loss of trade, and special injury to business. No allowance for counsel fee can be made except for defending the attachment suit, *i. e.*, none for defending the main action, and no damage can be given for loss of trade where it appears that the parties were winding up their business, and none for credit where they were insolvent.^(d)

§ 566. **Suits between different officers.**—* Questions of the kind we are now considering frequently arise in suits brought by one officer against another, to test the relative priority of different processes ; and in such a case it has been said, in Vermont, that damages are never given beyond the actual value of the property.¹ **

§ 567. **Receiptors.**—* In some of the States of the Union, property, when levied on, is sometimes delivered by the attaching officer to a third party, called a receiptor, who holds it during the litigation, and promises to redeliver it to the officer on demand. In a case of

¹ Goodrich v. Church, 20 Vt. 187.

(a) Nightingale v. Scannell, 18 Cal. 315. *Contra*, as to the latter point, Kane v. Johnston, 9 Bosw. 154 (*semble*).

(b) Knapp v. Barnard, 78 Ia. 347.

(c) Wilson v. Hillhouse, 14 Ia. 199.

(d) Roach v. Brannon, 57 Miss. 490 ; Marqueeze v. Sontheimer, 59 Miss. 430 ; see Comer v. Mackintosh, 48 Mich. 374.

this kind, in Vermont, the plaintiff, whose property had been unduly levied on, instead of that of the real debtor, brought his action of trespass, and, *pendente lite*, assigned his claim to the receiptor. Judgment was afterwards obtained and execution issued in the suits in which the attachment had been issued, and the officer demanded the property of the receiptor ; but he refused to deliver it. It was held that the defendants, on the trial of the action of trespass, were not entitled to give in evidence, in mitigation of damages, such refusal on the part of the receiptor, they never having offered to surrender to him his receipt, or discharge him from his liability thereon ;¹ and the same point has been similarly decided in Massachusetts.²

In another case of this kind, it has been decided in Vermont, that where the value of all the property attached and receipted for is expressed in the receipt at one entire sum, and a portion of it has been withdrawn from the custody of the receiptor, so as to discharge his liability, the damages in an action on the receipt are to be determined by assuming the whole value of the property receipted for to be the sum specified in their receipt, and by then ascertaining, on the basis of that assumed value, the just proportion which the property retained by the receiptor would bear to the property for which he is not liable.³ **

So, in New Hampshire, where property attached by

¹ *Ellis v. Howard*, 17 Vt. 330.

² *Robinson v. Mansfield*, 13 Pick. 139.

³ *Parsons v. Strong*, 13 Vt. 235 ; *Allen v. Carty*, 19 Vt. 65. In Connecticut, where the plaintiff, an officer who had, by virtue of an execution, levied on goods belonging to the judgment debtor, and delivered them to the defendants on their receipt or promise to redeliver, which not being done, suit

was brought ; it was objected that, as it was not stated in the declaration that the officer was commanded, in the writ against the original debtor, to attach to any certain amount, the plaintiff could only recover nominal damages ; but the Supreme Court held otherwise, and that the omission did not preclude the plaintiff from a recovery to the amount of the execution. *Jones v. Gilbert*, 13 Conn. 507.

the sheriff in two suits was delivered to a third party, who gave two receipts for it at the same value, which did not, however, state that one was subject to the other, and the receiptor, after judgment and execution, on a demand in the first suit, paid the amount due on the execution, it was held, after a subsequent judgment in the second suit against the owner, that the receiptor was liable to the officer only for the amount of the value receipted for over that paid in the first suit.^(*) Where the receiptor has allowed the attached property to go into the owner's possession, and judgment is recovered against him, in an action by the officer on the receipt, the amount of the judgment and interest, with the fees on execution, not exceeding the value of the property, are the usual measure of damages.^(b) But if, while the action is pending, the receiptor refuses to deliver the property to the officer, the latter may recover its full value, with interest from the demand.^(c) Where, in an action of trover, the goods for the value of which the action was brought had been attached and delivered to the defendant on his receipt, and he had retained them, this was held no reason for reducing the damages below their value.^(d) The valuation stated in the receipt is usually conclusive on the receiptor;^(e) but where the goods were returned to the sheriff and sold by him for a less sum than that stated in the receipt, and he brought action, alleging that they were damaged, it was held that the valuation in the receipt was not conclusive, and the sheriff must prove the amount of his loss.^(f) Where

(*) *Haynes v. Tenney*, 45 N. H. 183.

(b) *Foss v. Norris*, 70 Me. 117.

(c) *Clement v. Little*, 42 N. H. 563.

(d) *Luckey v. Roberts*, 25 Conn. 486.

(e) *Healy v. Hutchinson*, 20 Atl. Rep. 332 (N. H.).

(f) *Bancroft v. Parker*, 13 Pick. 192.

the property receipted for is an animal which dies in the receptor's possession without his default, he is not liable for its value.^(*)

§ 568. **Property sold illegally.**—* In New York it has been held, that where the property of a party is sold under illegal process, and the sum demanded is raised by a bid at the sale of the property, made by an agent of such party, who purchases for the benefit of his principal, and pays for the same with the money of the principal, the measure of damages, in an action of trespass against trustees of a school district, in such case, is the amount of the bid and the interest thereof, and not the value of the property sold.¹ **

§ 569. **Exclusion from office.**—Where a public officer is wrongfully excluded from his office, the measure of damages is the amount of his salary during the period of exclusion,^(b) deducting, however, if the defendant acted in apparent right and good faith, his reasonable expense in earning it.^(c) In *United States v. Addison*^(d) it was contended that the rule requiring diligence in seeking employment ought to be extended to the case of a public officer wrongfully ousted from his office. But the court held that "no such rule can be applied to public offices of personal trust and confidence."

¹ *Baker v. Freeman*, 9 Wend. 36. See, to same point, *Clark v. Hallock*, 16 Wend. 607.

(*) *Shaw v. Loughton*, 20 Me. 266.

(b) *Arris v. Stukely*, 2 Mod. 260; *Rule v. Tait*, 38 Kas. 765; *People v. Nolan*, 32 Hun 612.

(c) *Mayfield v. Moore*, 53 Ill. 428.

(d) 6 Wall. 291.

CHAPTER XVIII.

THE MEASURE OF DAMAGES FOR THE DEATH OF A HUMAN BEING.

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| <p>§ 570. No recovery for death at common law.</p> <p>571. Statutes.</p> <p>572. General principles.</p> <p>573. Present loss.</p> <p>574. Prospective pecuniary loss.</p> <p>575. Services of a child.</p> <p>576. Services after majority.</p> <p>577. Care and services of a parent.</p> | <p>§ 578. Services of a wife or husband.</p> <p>579. Next of kin.</p> <p>580. Evidence — Family circumstances.</p> <p>581. Probable duration of life.</p> <p>582. Excessive verdicts.</p> <p>583. Reduction of damages.</p> <p>584. Exemplary damages.</p> <p>585. Contributory negligence.</p> |
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§ 570. No recovery for death at common law.^(*)—*At common law, and independently of statutory provision, the death of a human being is not the ground of an action for damages.^(b) In a case where the plaintiff brought an action against the proprietors of a stage-coach for negligent driving, by which his wife was killed, Lord Ellenborough said that, “in a civil court, the death of a human being cannot be complained of as an injury.”¹ And so it has been held in Massachusetts, in a case where a widow sued a railroad company for negligence, by which her husband had been killed.²

In New York, in an action on the case³ for negligently running over and killing the plaintiff's son, a lad of ten years of age; the judge charged that the plaintiff

¹ *Baker v. Bolton*, 1 Camp. 493.

² *Ford v. Monroe*, 20 Wend. 210.

³ *Carey v. Berkshire R.R. Co.*, 1 Cush. 475.

(*) It is scarcely necessary to say that what is said here did not apply during the existence of slavery to an action for the death of a slave.

(b) *Insurance Co. v. Brame*, 95 U. S. 754, and cases cited.

was entitled to recover such sum by way of damages, as they would be of the opinion the services of the child would have been worth, until he became twenty-one years of age. The case was carried up, but no question seems to have been distinctly made as to the correctness of this direction.^(*) And in a subsequent case in the same State, where the plaintiff's infant child died within an hour and a half after the injury, Bronson, J., delivering the opinion of the Court of Appeals, said: "I have a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician's bill and funeral expenses"; but the point was not decided.¹ **

There may, of course, be an action at common law for an injury finally resulting in death, apart from any statute. Thus, a father may recover for loss of service, if the death was not instantaneous; and a husband may maintain an action for the loss of his wife's services, caused by an injury done her by the defendant's malpractice, notwithstanding the injury resulted in her death; but the recovery should be only for the loss of her services between the injury and the death, and without including damages for her mental suffering.^(b) In some States, by statute, actions for personal injuries survive to the representatives of the injured person, and in such cases the damages recoverable are those which the injured person could have recovered had he survived.^(c)

In New Hampshire, in such an action, it is said that the administrator may recover for distress and anxiety of

¹ *Pack v. New York*, 3 N. Y. 489.

(*) *Acc. Drew v. Sixth Ave. R.R. Co.*, 26 N. Y. 49.

(b) *Hyatt v. Adams*, 16 Mich. 180.

(c) *Muldowney v. Illinois C. Ry. Co.*, 36 Ia. 462; *Clark v. Manchester*, 62 N. H. 577.

mind experienced by the deceased while in imminent danger, in view of impending death.^(*) Under the Kentucky statute, it is held that an appreciable interval must elapse between the injury and the death for the action to survive.^(b)

§ 571. Statutes.—* The remissness of the common law in this respect has been cured by various statutes. In England, the 9 & 10 Vict., c. 93, commonly known as Lord Campbell's act, provides, that whenever the death of a person shall be caused by a wrongful act, and which would, if death had not ensued, have entitled the party injured to maintain an action, the party offending shall be liable, notwithstanding the death. So, in Massachusetts,¹ if the life of any passenger is lost by the negligence, etc., of the proprietors of a railroad, etc., or of their servants, the proprietors shall be liable to a fine, not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment for the benefit of the widow and heirs.

And in New York, a statute² provides, that whenever the death of any person shall be caused by any wrongful act or neglect, the party who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured, and although the act be felonious. This statute is taken from the English statute above cited, and the second section provides that the action is to be brought by the personal representatives of the deceased, and that "in every such action the jury may give such damages as they deem a fair and just compensation, not exceeding five thousand dollars,

¹ Stat. 1840, c. 80; Pub. Stats., c. 112, § 212. ² Laws of 1847, c. 450.

(*) *Corliss v. Worcester, N. & R. R.R. Co.*, 63 N. H. 404.

(b) *Hansford v. Payne*, 11 Bush 380.

with reference to the injuries resulting from such death, to the person." ** These statutes are the basis of legislation in probably every jurisdiction where the common law prevails. The action for damages for negligently causing death is usually given by statute to the personal representatives of the deceased for the benefit of the "widow or next of kin," or, as in New York, of the "husband, widow, or next of kin," although, in some of the States, the wording of the English statute, "wife, husband, parent, child," is followed. The damages are usually limited to compensation for the "pecuniary injuries" resulting from the death, and in many of the States are not permitted to exceed \$5,000. For the specific provision of the statute as it exists in the various States reference must be had to laws of those States. Where, as in New York, a father can recover damages for the loss of service of his son, from a person who negligently caused his death, independent of the statute, it is held that a recovery under the statute will bar an action on the former ground.^(*)

§ 572. **General principles.**—The decisions in cases arising under the statutes are not in entire harmony, and many of them go farther in the allowance of damages than a correct interpretation of the statutes would seem to justify. The courts have found difficulty in giving to the jury any satisfactory rule under which the damages in a given case could be estimated. Loose directions have in consequence been often given to the jury, who, influenced as it would seem by sentimental considerations, have in many cases awarded damages where the life destroyed was without present or prospective value. In the *Penn. R.R. Co. v. Keller* ^(b) it is said that the life is to be

(*) *McGovern v. New York C. & H. R. R.R. Co.*, 67 N. Y. 417.

(b) 67 Pa. 300.

regarded as property to be compensated for, "without regard to past earnings or capacity to earn at the time of death," and that the controversies which would arise, if the opposite rule were adopted, would be "repugnant and offensive to the sensibilities of every person." (*) It is submitted, with great deference, that this reasoning is unsound. Life, by the common law, was not property; its loss, however injurious, was not the subject of a civil action for damages. The former rule has only been modified by this statute, under which juries are allowed to give, in most of the States, damages for *pecuniary injuries* only; and all considerations as to the results of this view to the sensibilities of individuals are purely sentimental, and can have no weight in determining the proper scope of the statute. It would seem, in the absence of judicial construction, that the term "pecuniary injury" meant an injury resulting in the loss of money, either present or prospective, and proximate. A somewhat wider signification has been given to it by Denio, J., in *Tilley v. The N. Y. C. & H. R.R. Co.*,^(b) and embodies the interpretation which seems to have been generally adopted by the courts. In this case the action was brought to recover damages for the death of a mother, leaving surviving her children of tender years. The learned judge said: "The word pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized

(*) See, also, *North P. R.R. Co. v. Robinson*, 44 Pa. 175.

(b) 24 N. Y. 471, 476

measure of value." The learned judge regarded the loss of nurture, of intellectual, moral, and physical training, and of "such instruction as can only proceed from a mother," as essential to the future well-being of the children, and as, therefore, falling within the term "pecuniary," as used in the statute.^(a) Under this interpretation of the word, three classes of cases would be embraced: (1) Those where there is a present pecuniary loss; (2) those where there is a prospective pecuniary loss; and (3) those in which the death deprives the claimant of services which would, in the ordinary course of events, result in a pecuniary value to him. A given case may embrace any or all of these elements. Definite instructions should be given to the jury as to the true measure of damages under the statute.^(b) Although much must be left, it is said, to their sound discretion.^(c)

§ 573. **Present loss.**—The rule governing the jury in their estimate of the present pecuniary loss is, of course, the ordinary one, that the injured person shall receive compensation for the loss sustained to the time of the action; when it becomes necessary to determine the particular items of that loss, the question arises whether the principle of liability under the statute is the same as if the injured party had survived and brought the action. In *Whitford v. The Panama R.R. Co.*^(d) the court said:

"Although the action can be maintained only in the cases in which it could have been brought by the deceased, if he had survived, the damages are, nevertheless, given upon different principles and for different causes. In an action brought by a

^(a) See, also, *McIntyre v. New York C. R.R. Co.*, 37 N. Y. 287.

^(b) *Coates v. B. C. R. & N. Ry. Co.*, 62 Ia. 486; *Pennsylvania R.R. Co. v. Vandever*, 36 Pa. 298; *Philadelphia & R. R.R. Co. v. Adams*, 89 Pa. 31; *Galveston v. Barbour*, 62 Tex. 172.

^(c) *Stoher v. St. Louis, I. M. & S. Ry. Co.*, 91 Mo. 509; *Pennsylvania R.R. Co. v. Ogier*, 35 Pa. 60.

^(d) 23 N. Y. 465, 469. But see dissenting opinion of Comstock, J.

person injured, but not fatally, by the negligence of another, he recovers for his pecuniary loss and, in addition, for his pain and suffering of mind and body ; while, under the statute, it is not the recompense which would have belonged to him which is awarded to his personal representative, but the damages are to be estimated with reference to the pecuniary injuries resulting from such death to the wife and next of kin."

This case has been generally followed. The same view is taken by Mr. Justice Coleridge, in *Blake v. The Midland Ry. Co.*,^(*) where he says: "The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family."^(b) The statute contemplates compensation to the widow, next of kin, etc., *from the death*, not for the injuries to the deceased from the *wrongful act*; and thus damages for the mental and physical sufferings of the deceased cannot be recovered under the statute.^(c) The same reasoning leads to the conclusion that expenses for medical attendance, funeral expenses, etc., are not proper items of damages under the statute,^(d) although in this country generally the medical expenses and the funeral expenses attendant upon the burial of the deceased may be recovered, where

^(*) 18 Q. B. 93.

^(b) See *acc.* *Cleveland & P. R.R. Co. v. Rowan*, 66 Pa. 393.

^(c) *Blake v. Midland Ry. Co.*, 18 Q. B. 93; *Kelley v. Central R.R. Co.* (Ia.), 5 McCr. 653; *Holland v. Brown* (Ore.), 35 Fed. Rep. 43; *Hall v. Galveston, H. & S. A. Ry. Co.* (Tex.), 39 Fed. Rep. 18; *Cleary v. City R.R. Co.*, 76 Cal. 240; *Holton v. Daly*, 106 Ill. 131; *Donaldson v. Mississippi & M. R.R. Co.*, 18 Ia. 280; *Louisville & N. Ry. Co. v. Coniff*, 14 S. W. Rep. 543 (Ky.); *Mynning v. Detroit, L. & N. R.R. Co.*, 59 Mich. 257; *Telfer v. N. R.R. Co.*, 30 N. J. L. 188; *Whitford v. Panama R.R. Co.*, 23 N. Y. 465; *Cotton Press Co. v. Bradley*, 52 Tex. 587. *Contra* under the Tennessee statute: *Louisville & N. R.R. Co. v. Stacker*, 86 Tenn. 343. Query under the Virginia statute: *Baltimore & O. R.R. Co. v. Wightman*, 29 Gratt. 431.

^(d) *Boulter v. Webster*, 13 W. R. 289; *Dalton v. Southeastern Ry. Co.*, 4 C. B. N. S. 296; *Holland v. Brown*, 35 Fed. Rep. 43. They may be recovered in an action of *contract*. *Pulling v. Great Eastern Ry. Co.*, 9 Q. B. D. 110.

any of those for whose benefit the action is brought are legally bound to pay such expenses.^(*) But as these expenses would be necessarily incurred at some time for the deceased, the reason for charging them as items of damage, under the statute, is not apparent. No damages can be given, under the statute, for mental suffering and grief occasioned by the death of the deceased.^(b)

Nor can damages be recovered for the loss of the society of the deceased.^(c) Thus a husband cannot recover for the loss of his wife's society.^(d) Nor can recovery be had for any injury to the plaintiff except what results directly from the death to the estate of the deceased.^(e) So no damages can be recovered for injuries

(*) Little Rock & F. S. Ry. Co. *v.* Barker, 33 Ark. 350; Cleary *v.* City R.R. Co., 76 Cal. 240; Owen *v.* Brockschmidt, 54 Mo. 285; Murphy *v.* New York C. & H. R. R.R. Co., 88 N. Y. 445; Pennsylvania R.R. Co. *v.* Bantom, 54 Pa. 495; Cleveland & P. R.R. Co. *v.* Rowan, 66 Pa. 393; Petrie *v.* Columbia & G. R.R. Co., 29 S. C. 303.

(b) Kelley *v.* Central R.R. Co., 4 McCr. 653 (Ia. Stat.); Holland *v.* Brown, 35 Fed. Rep. 43 (Ore. Stat.); Little Rock & F. S. Ry. Co. *v.* Barker, 33 Ark. 350; Munro *v.* Pacific C. D. & R. Co., 84 Cal. 515 (explaining Cleary *v.* City R.R. Co., 76 Cal. 240); Chicago *v.* Major, 18 Ill. 349; Chicago & R. I. R.R. Co. *v.* Morris, 26 Ill. 400; Chicago, B. & Q. R.R. Co. *v.* Harwood, 80 Ill. 88; Ohio & M. R.R. Co. *v.* Tindall, 13 Ind. 366; Agricultural & M. Assoc. *v.* State, 71 Md. 86; Baltimore & R. T. *v.* State, 71 Md. 573; Pennsylvania R.R. Co. *v.* Vandever, 36 Pa. 298; Pennsylvania R.R. Co. *v.* Goodman, 62 Pa. 329; Canadian P. Ry. Co. *v.* Robinson, 14 Can. 105. Under the Virginia statute a *solatium* may be recovered: Baltimore & O. R.R. Co. *v.* Wightman, 29 Gratt. 431; Baltimore & O. R.R. Co. *v.* Noell, 32 Gratt. 394.

(c) Pym *v.* Great Northern Ry. Co., 4 B. & S. 396; Hall *v.* Galveston, H. & S. A. Ry. Co., 39 Fed. Rep. 18; Little Rock & F. S. Ry. Co. *v.* Barker, 33 Ark. 350; Kerkow *v.* Bauer, 15 Neb. 150; Telfer *v.* Northern R.R. Co., 30 N. J. L. 188; Tilley *v.* New York C. & H. R. R.R. Co., 24 N. Y. 471; Caldwell *v.* Brown, 53 Pa. 453. *Contra* in California: Beeson *v.* Green Mountain G. M. Co., 57 Cal. 20; Cook *v.* Clay St. H. R.R. Co., 60 Cal. 604; Munro *v.* Pacific C. D. & R. Co., 84 Cal. 515.

(d) Howard Co. *v.* Legg, 93 Ind. 523; Baltimore & O. R.R. Co. *v.* State, 63 Md. 135; St. Lawrence & O. Ry. Co. *v.* Lett, 11 Can. 422. *Contra*, Cregin *v.* Brooklyn C. R.R. Co., 19 Hun 341.

(e) East Tenn., V. & G. R.R. Co. *v.* Toppins, 10 Lea 58.

to the widow's health caused by overwork.^(*) And where the plaintiff was the partner as well as next of kin to the deceased, no compensation could be recovered for dissolution of the partnership.^(b) As the court said in the last case, the statute gives damages "for injuries resulting from the severance of a relation of kinship and not of contract."

§ 574. **Prospective pecuniary loss.**—Where there is a prospective pecuniary loss resulting from the death, damages may be recovered in compensation for such loss.^(c) It may be difficult, from the nature of the case, to lay down more than a general rule to govern the jury in their award of prospective damages.^(d) There should be, at least, a *reasonable expectation* of pecuniary benefit from the life of the deceased to entitle the plaintiff to recover;^(e) but the expectation of benefit need not be based on legal or moral obligation. It is to be based on circumstances showing a probability of such benefit.^(f) The amount of compensation for this prospective pecuniary loss rests in the discretion of the jury.^(g) In *Louisville & N. R.R. Co. v. Stacker*,^(h) Snodgrass, J., said: "The age, condition, capacity of

(*) *Elshire v. Schuyler*, 15 Neb. 561.

(b) *Demarest v. Little*, 47 N. J. L. 28.

(c) *Balt. & O. R.R. Co. v. State*, 33 Md. 542; *Oldfield v. The N. Y. & H. R.R. Co.*, 14 N. Y. 310; *O'Mara v. Hudson R.R. Co.*, 38 N. Y. 445; *Ihl v. 42d St. R.R. Co.*, 47 N. Y. 317; *Penn. R.R. Co. v. Adams*, 55 Pa. 499.

(d) *Chicago & N. W. R.R. Co. v. Sweet*, 45 Ill. 197.

(e) *Franklin v. Southeastern Ry. Co.*, 3 H. & N. 211; *Dalton v. Southeastern Ry. Co.*, 4 C. B. N. S. 296; *Baltimore & O. R.R. Co. v. State*, 24 Md. 271; *Baltimore & O. R.R. Co. v. State*, 60 Md. 449; *Kesler v. Smith*, 66 N. C. 154; *Kaspari v. Marsh*, 74 Wis. 562.

(f) *Johnson v. Missouri P. Ry. Co.*, 18 Neb. 690; *Tuteur v. Chicago & N. W. R.R. Co.*, 46 N. W. Rep. 897 (Wis.).

(g) *Little Rock & F. S. Ry. Co. v. Barker*, 39 Ark. 491; *Frick v. St. Louis, K. C. & N. Ry. Co.* 75 Mo. 542.

(h) 86 Tenn. 343, 353.

earning money, and expectation of life, are all to be considered; and not only considered, but given due weight in arriving at what is a fair and just result, which is and ought to be the aim and end of every litigation." In *Central R.R. Co. v. Thompson*,^(*) Jackson, C. J., said: "The jury is not confined to any procrustean rule in measuring the value of a life. Age, health, habits, the money he is making, are all data from which the jury may argue his length of life and ability to work, and thus what that life is worth to his wife." In *Baltimore & O. R.R. Co. v. Wightman*,^(b) the court said that the jury should consider "the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed."^(c) In *Etherington v. Prospect Park & C. I. R.R. Co.*,^(d) action was brought by plaintiff, as administrator, for the death of his infant daughter; and the question was upon the propriety of the judge's charge in the court below. After the judge had charged that nothing could be recovered under the act of 1847 by the plaintiff for injury to the feelings of the next of kin, but that the recovery must be merely to compensate them for the pecuniary injury, and that plaintiff was entitled to recover the loss in money which the next of kin had sustained by the death of the child, he added a charge, to which defendant's counsel excepted, as follows:

(*) 76 Ga. 770, 782.

(b) 29 Gratt. 431, 443.

(c) *Acc. Kelley v. Central R.R. Co.*, 5 McCr. 653; *Ohio & M. Ry. Co. v. Voight*, 122 Ind. 288; *Baltimore & R. T. v. State*, 71 Md. 573; *Shaber v. St. Paul, M. & M. Ry. Co.*, 28 Minn. 103; *Opsahl v. Judd*, 30 Minn. 126.

(d) 88 N. Y. 641.

"And yet the jury will see that there is no way to ascertain mathematically what that damage would be; it necessarily must be to a great extent speculative, and the only thing the legislature has done to help out a jury is to limit the amount, beyond which they cannot go. I don't know anything to control or fix the ground of your verdict in this way except it is your good judgment, and the statute which limits the recovery in all cases to five thousand dollars."

He charged the jury that their verdict must represent their judgment as to the amount the death of the child had injured the next of kin pecuniarily, and that,

"if the jury find a verdict for the plaintiff at all it can only find a verdict for the pecuniary injury resulting to the next of kin by the death of the child; nothing can be allowed for in damages which is not of a definite pecuniary value. In estimating the damages, in case the jury should find a verdict for the plaintiff, they must take into account the age and sex of the deceased, . . . the social condition and standing of the next of kin, and the probability of their sustaining any pecuniary damage by her death. The sufferings of the deceased person from the injuries, the grief and distress of her relatives, nor the loss of her society, cannot be taken into account in estimating damages."

The Court of Appeals held, "That, taking the whole charge upon the subject of damages, it was certainly fair and just to the defendant, and subject to no legal exception."

In *Eames v. Brattleboro*,^(*) the court held it proper to instruct the jury that recovery can be "independent of the fact whether the children were dependent upon her for their material support, and independent of the fact whether she had any legal obligation to support them or not. If there was a reasonable expectation that these children would derive an advantage from the continuance of their mother's life, capable of being estimated

(*) 54 Vt. 471.

and appreciated in a pecuniary sense, whether she was bound to render any assistance in a legal point of view or not."

In Illinois, where the jury are directed by statute to give such damages "as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death," it is held that the jury should calculate the damages with reference to a reasonable expectation of benefit as of right or otherwise (*i. e.*, of grace or favor) from the continuance of the life.^(*) The rule as to the proper measure of damages in this class of cases is nowhere better stated than by Sharswood, J., in *Pennsylvania R.R. Co. v. Butler*,^(b) where the learned judge said :

"After an attentive examination and review of all the cases which have heretofore been decided, we are of opinion that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered—in this instance the children of the decedent—without any *solatium* for distress of mind, and that loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure."^(c)

In estimating the prospective pecuniary loss through loss of expected accumulations of the deceased, no account can be taken of income from investments already made.^(d) No special damage to the next of kin need

(*) *Chicago v. Keefe*, 114 Ill. 222.

(c) 57 Pa. 335, 358.

(b) To the same effect, *Taylor v. West. P. R.R. Co.*, 45 Cal. 323; *Burton v. Wilmington & W. R.R. Co.*, 82 N. C. 504; *Catawissa R.R. Co. v. Armstrong*, 52 Pa. 282; *Mansfield Coal Co. v. McEnery*, 91 Pa. 185; *Castello v. Landwehr*, 28 Wis. 522.

(d) *Demarest v. Little*, 47 N. J. L. 28.

be pleaded, as the statute is held to contemplate some damage.^(a)

§ 575. *Services of a child.*—A parent may recover the value of the services of a minor child during the minority.^(b) But it should be made to appear to the jury that there is at least a *reasonable* expectation that the services of the child will be of pecuniary value to the plaintiff;^(c) and the complaint should allege that the father has suffered damage by the loss of service, or has been put to expense.^(d) Since the jury must be satisfied by proof of the *probability* of actual loss resulting to the plaintiff from the death of the minor, the condition of the parents, the occupation of the father, etc., are admissible in evidence in this class of cases, when not in others under the statute, to enable the jury to determine the actual loss which will, in all probability, result from the death of the child.^(e) The expense of providing for the child, had he lived, should be estimated and deducted from the estimated earnings of the child.^(f) Van Dyke, J., in *Telfer v. Northern R.R. Co.*,^(g) said :

(a) *Chicago v. Hesing*, 83 Ill. 204; *Stafford v. Rubens*, 115 Ill. 196; *Barnum v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 461; *Johnson v. St. Paul & D. R.R. Co.*, 31 Minn. 283.

(b) *Duckworth v. Johnson*, 4 H. & N. 653; *Condon v. Great Southern R.R. Co.*, 16 Ir. Com. L. 415; *Little Rock & F. S. Ry. Co. v. Barker*, 33 Ark. 350; *Cleary v. City R.R. Co.*, 76 Cal. 240; *Illinois C. R.R. Co. v. Slater*, 129 Ill. 91; *Agricultural & M. Assoc. v. State*, 71 Md. 86; *Robel v. Chicago, M. & St. P. Ry. Co.*, 35 Minn. 84; *Oldfield v. New York & H. R.R. Co.*, 14 N. Y. 310; *O'Mara v. Hudson R. R.R. Co.*, 38 N. Y. 445; *Ihl v. 42d St. R.R. Co.*, 47 N. Y. 317; *Gill v. Rochester & P. R.R. Co.*, 37 Hun 107; *Pennsylvania R.R. Co. v. Bantom*, 54 Pa. 495; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613.

(c) *Atchison, T. & S. F. R.R. Co. v. Brown*, 26 Kas. 443; *Potter v. Chicago & N. W. Ry. Co.*, 21 Wis. 372.

(d) *Edgar v. Castello*, 14 S. C. 20.

(e) *Barley v. Chicago & A. R.R. Co.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613.

(f) *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 36 Ark. 41.

(g) 30 N. J. L. 188, 209.

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"The action is the creation of the statute, and it is needless to say that it must conform strictly to it. It is liable to great abuse, and the court should see that every verdict which is rendered contrary to it should be set aside. It is simply an action to recover, in dollars and cents, a compensation for the loss and damages which have actually been sustained. As the father of his children, the plaintiff was entitled to their services until they should arrive at the age of twenty-one years ; and what those services might reasonably have been expected to be worth, he was entitled to recover, and nothing more, unless it be expenses growing out of the injuries, subject to the burdens and encumbrances which that relationship imposed upon him." (°)

The cases of *Ihl v. 42d St. R.R. Co* ; (°) *Oldfield v. New York & H. R.R. Co.*, (°) and *O'Mara v. Hudson R. R.R. Co.*, (°) which are sometimes quoted as authorities for the position that the statute does not limit the recovery to the actual pecuniary loss proved on the trial, can only be regarded as correctly decided if the word *actual* is used as synonymous with the word *present* ; and this would seem to be the case from the language used by Wright, J., in *Oldfield v. The N. Y. & H. R.R. Co.* Yet in *Gorham v. New York C. & H. R. R.R. Co.*, (°) the court said :

"It was held in an action to recover damages for death of a child, three years old, under provision of ch. 450, L. 1847, as amended by ch. 256, L. 1849, that absence of proof of special pecuniary damage resulting from death of the child will not justify the court in nonsuiting the plaintiff or in directing the jury to find only nominal damages."

§ 576. *Services after majority.*—The weight of authority is that the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of

(°) *Acc. Benton v. Chicago, R. I. & P. Ry. Co.*, 55 Ia. 496.

(°) 47 N. Y. 317.

(°) 14 N. Y. 310.

(°) 38 N. Y. 445.

(°) 23 Hun 449, 451.

the life beyond the minority.^(a) Thus Earl, J., said in *Birkett v. Knickerbocker Ice Co* :^(b)

"The jury were not bound, in estimating the compensation to be made for the death of the child, to confine their considerations to her minority. It is true that the plaintiff, as father, could command her services only during her minority. But in certain circumstances she might, after her majority, owe him the duty of support, which could, by legal proceedings, be enforced ; and after that event she might, in many ways, be of great pecuniary benefit to him. In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probable, or even possible, benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. There is no rule but their own good sense for their guidance, and they were not in this case bound to assume that no pecuniary benefits would come to the next of kin from this child after her majority."

In some jurisdictions, however, nothing can be recovered on account of loss of services after majority where the child was a minor when he died.^(c) "The chances of survivorship, his ability and willingness to support her, are matters too vague to enter into an estimate of damages merely compensatory."^(d) In

(a) *Fordyce v. McCants*, 51 Ark. 509; *Munro v. Pacific C. D. & R. Co.*, 84 Cal. 515; *St. Joseph & W. R.R. Co. v. Wheeler*, 35 Kas. 185; *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518; *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 293; *Potter v. Chicago & N. W. R.R. Co.*, 21 Wis. 372. And so where the statute provides that the action shall be in favor of "the estate of the deceased," it is held that damages are not limited to the minority of the child. *Pennsylvania R.R. Co. v. Lilly*, 73 Ind. 252; *Walters v. Chicago, R. I. & P. R.R. Co.*, 36 Ia. 458.

(b) 110 N. Y. 504, 508.

(c) *State v. Baltimore & O. R.R. Co.*, 24 Md. 84; *Cooper v. Lake Shore & M. S. Ry. Co.*, 66 Mich. 261; *Telfer v. Northern R.R. Co.*, 30 N. J. L. 188; *Pennsylvania R.R. Co. v. Kelly*, 31 Pa. 372; *Pennsylvania R.R. Co. v. Zebe*, 33 Pa. 318; *Caldwell v. Brown*, 53 Pa. 453; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95.

(d) *State v. Baltimore & O. R.R. Co.*, 24 Md. 84, 107.

Cooper *v.* Lake Shore & M. S. Ry. Co.(*) the court said :

“Here was a broad field of chance and probabilities laid open before the jury through which they could roam without limit. They were permitted to speculate upon the future, and consider the probabilities or the possibilities of its unknown and unknowable contingencies; to consider and guess at what might occur had the daughter not been killed, and had lived to an age measured by the probable duration of the life of a person 11 years of age. They were given the *data* of a healthy girl of 11 years of age, born of poor parents, living with and being cared for by her grandmother; and from this they were required to solve the mighty problem of a life whose future was unknown, and from its unfathomable depths to figure out the chances of pecuniary benefits the parents of that child would have received had she lived past the age of majority.”

In case, however, of the killing of an adult child who is at the time actually rendering services, recovery may be had even in these jurisdictions.(b) The fact that the father of a deceased minor prior to the accident had relinquished to him the right to his time and services is not a bar to the action,(c) but may be taken into account in reduction.(d) It seems to be everywhere held that a father may recover for loss of the advice of his adult son in pecuniary matters, if the probability of such loss is shown.(e) In *Houston & T. C. Ry. Co. v. Cowser*,(f) it is suggested that the best measure of damages would, perhaps, be such a sum as would produce an annuity equal to the value of the

(*) 66 Mich. 261, 270, *per* Champlin, J.

(b) *Agricultural & M. Assoc. v. State*, 71 Md. 86.

(c) *Agricultural & M. Assoc. v. State*, 71 Md. 86.

(d) *St. Joseph & W. R.R. Co. v. Wheeler*, 35 Kas. 185.

(e) *North Pennsylvania R.R. Co. v. Kirk*, 90 Pa. 15. So of a minor son, upon sufficient proof; *Gill v. Rochester & P. R.R. Co.*, 37 Hun 107.

(f) 57 Tex. 293.

pecuniary aid that the plaintiff would have derived from his deceased son, calculated on the basis of all accessible facts, including probable duration of life. But the amount of recovery is not necessarily restricted to such a sum.^(*)

§ 577. *Care and services of a parent.*—The case of the death of the parents, where the death occasions actual pecuniary loss to the child, present or prospective, falls within the class of cases already considered; and a minor may recover for loss of support during minority.^(b) Where there is no present pecuniary loss, but where the services of the parent are such as to place the children in a better position in life, damages may be recovered under the rule as laid down in *Tilley v. Hudson R. R.R. Co.*^(c) In *Howard Co. v. Legg*^(d) Elliott, J., said: "The care, training, and education which a father can give his children may justly be regarded as increasing their capacity to make their way in the world, and this capacity, surely, may be valuable even in a pecuniary sense." In *Baltimore & O. R.R. Co. v. Wightman*^(e) it was said that recovery could be had for the value of the parent's services in the superintendence, attention to, and care of his family and the education of his children, of which they have been deprived by his death.^(f) But a child can recover for the loss of such advice only as would have had pecuniary value, in estimating which the age and situation of

(*) *International & G. N. R.R. Co. v. Kindred*, 57 Tex. 491.

(b) *Baltimore & R. T. v. State*, 71 Md. 573; *McPherson v. St. Louis, I. M. & S. Ry. Co.*, 97 Mo. 253.

(c) 24 N. Y. 471.

(d) 93 Ind. 523, 530.

(e) 29 Gratt. 431.

(f) *Acc. Stohr v. St. Louis, I. M. & S. Ry. Co.*, 91 Mo. 509; *Searle v. Kenawha & O. Ry. Co.*, 32 W. Va. 370; *St. Lawrence & O. Ry. Co. v. Lett*, 11 Can. 422.

the parties is to be considered ; ^(a) and where there is no proof that the deceased was fitted by nature or education, or by disposition, to furnish to his children instruction, or moral, physical, or intellectual training, it has been said that it is erroneous to allow the jury to consider the loss of instruction and moral training by the children.^(b)

A married adult daughter with whom the deceased mother lived may recover the value of the services which the deceased was in the habit of performing.^(c)

§ 578. *Services of a wife or husband.*—A husband may recover the value of the services of his deceased wife, though he can recover nothing for the loss of her companionship.^(d) So a widow may recover compensation for loss of support of her deceased husband.^(e) A widow may recover for loss of support though separated from her husband at the time of his death. He still owed her his support ; and an inquiry into the question whether he meant to support her is irrelevant.^(f)

The Georgia statute ^(g) gives to the widow the right to recover the full value of her husband's life. This statute was meant to alter the rule that the family could only recover the value of the life to it, *i. e.*, the support they would derive from it. Hence the jury is to give, under the new statute, the entire prospective value of the life ; the sum which would produce an annuity corresponding

^(a) *Demarest v. Little*, 47 N. J. L. 28.

^(b) *Illinois C. R.R. Co. v. Weldon*, 52 Ill. 290 ; *Chicago, R. I. & P. R.R. Co. v. Austin*, 69 Ill. 426. But it would seem that proof of such unfitness should come from the defendant.

^(c) *Baltimore & O. R.R. Co. v. State*, 63 Md. 135.

^(d) *St. Lawrence & O. Ry. Co. v. Lett*, 11 Can. 422.

^(e) *Baltimore & R. T. v. State*, 71 Md. 573 ; *Nichols v. Winfrey*, 90 Mo. 403.

^(f) *Dallas & W. Ry. Co. v. Spicker*, 61 Tex. 427.

^(g) Code, § 2972.

to the probable prospective income and earnings of the deceased.^(*)

§ 579. *Next of kin.*—Where, as formerly in the N. Y. statute, it is provided that the amount recovered shall be for the exclusive benefit of the widow and next of kin, questions arise which do not need to be considered where the action is given, as in the English statute, for the benefit of “the wife, husband, parent, and child.” Thus it was held in New York, prior to the amendment of 1870 (L. of 1870, c. 78), by which the husband was included among those entitled to recover, that under the wording “next of kin,” the husband could not recover.^(b) Under what circumstances the “next of kin” may recover for the death of a relative under the statute is considered in *Chicago & A. R.R. Co. v. Shannon*,^(c) where the court says: “If the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent upon the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been a pecuniary loss, for which compensation under the statute must be given.” It would seem, however, that nominal damages at least may, whenever the action is given, be recovered.^(d) To entitle the

^(*) *Georgia R.R. Co. v. Pittman*, 73 Ga. 325.

^(b) *Dickins v. New York C. R.R. Co.*, 23 N. Y. 158; *Drake v. Gilmore*, 52 N. Y. 389; *Green v. Hudson R. R. Co.*, 2 Keyes 294; *Lucas v. New York C. R.R. Co.*, 21 Barb. 245. A contrary view of this question is taken in *Steel v. Kurtz*, 28 Oh. St. 191.

^(c) 43 Ill. 338.

^(d) *Chicago v. Scholten*, 75 Ill. 468; *Atchison, T. & S. F. R.R. Co. v. Weber*, 33 Kas. 543; *Johnston v. Cleveland & T. R.R. Co.*, 7 Oh. St. 336.

plaintiff to recover, it is not necessary that he should have had a legal claim for support on the deceased.^(*)

§ 580. **Evidence—Family circumstances.**—That the conditions and circumstances of the plaintiff cannot be shown to increase or diminish the damages is the doctrine approved by the best authorities. The question is ably considered by Cooley, C. J., in *Chicago & N. W. Ry. Co. v. Bayfield*,^(b) where the learned judge said: "The damages recoverable in a case of this nature are by the statute to be assessed with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person. They have no regard to the needs of the person designated, or to any moral obligation which may have rested upon the deceased to supply their wants. . . . What the family would lose by the death would be, what it was accustomed to receive, or had reasonable expectation of receiving, in his lifetime; and to show that the family was poor has no tendency towards showing whether this was or was likely to be large or small." In *Illinois C. R.R. Co. v. Baches* ^(c) it was held erroneous for the court below to refuse to instruct the jury that the pecuniary circumstances of the plaintiff and her infant daughter, and the fact that the plaintiff had a deformity of her hand, could not increase or diminish the amount of damages under the statute, the court saying: "How she has lost more money by being crippled than if she had not been, by the death of her husband, is not to our minds in any wise apparent. The question is how much has she lost in a pecuniary view, and the jury should be required to assess damages in this class of cases alone on

^(*) *Railroad Co. v. Barron*, 5 Wall. 90; *Grotenkemper v. Harris*, 25 Oh. St. 510.

^(b) 37 Mich. 205, 214.

^(c) 55 Ill. 379, 389.

that basis." (*) But in Wisconsin it has been held that a widow, suing as administratrix of her deceased husband, may show the number of children dependent upon her, (b) and that she had no other means of support than the deceased. (c) An apparent exception to this principle exists in the rule, which permits, in the case of the death of minors, the condition of the parents to be given in evidence; (d) and in the case of the death of a mother, the poor health of minor children. (e) But the evidence in this latter class of cases is admitted, it would seem, to assist the jury in determining the probability of pecuniary loss to the plaintiff: thus, if the father is poor, the probability is great that he would have required the services of the son; if well-to-do, the probability is equally great that he would have derived no pecuniary benefit from the service of his son; and if the children are in poor health the mother's services are the more requisite. (f)

§ 581. *Probable duration of life.*—As the probable duration of the life of the deceased is one of the elements to be considered by the jury in their award of damages under the statute, mortality tables may be introduced in evidence. (g) But they must be allowed no more effect than

(*) See to the same effect *Chicago & N. W. R.R. Co. v. Moranda*, 93 Ill. 302; *Pennsylvania R.R. Co. v. Butler*, 57 Pa. 335; *Mansfield Coal Co. v. McEnery*, 91 Pa. 185. A contrary ruling in *Kansas P. Ry. Co. v. Cutter*, 19 Kas. 83, cannot be regarded as well considered.

(b) *Mulcairns v. Janesville*, 67 Wis. 24; *acc.* in *Nebraska*, *Kerkow v. Bauer*, 15 Neb. 150.

(c) *Annas v. Milwaukee & N. R.R. Co.*, 67 Wis. 46.

(d) *Barley v. Chicago & A. R.R. Co.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169; *Opsahl v. Judd*, 30 Minn. 126; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613.

(e) *McKeigue v. Janesville*, 68 Wis. 50.

(f) But see the remarks of Cooley, C. J., upon the admission of this kind of evidence in this class of cases, in *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205, 215.

(g) *Rowley v. London & N. W. Ry. Co.*, L. R. 8 Ex. 221; *David v. South-*

to prove the probable continuance of life. In *Central R.R. Co. v. Thompson* (*) Jackson, C. J., said: "The tables prepared for life insurance do not contemplate at all ability to work, and how long that ability will continue, and how much it will decrease as age increases, but those tables only calculate life's duration, however feeble and incapable of labor that life will be in old age." So any disease of the deceased that would tend to shorten his life, may be shown upon the question of the probable continuance of life. Thus it may be proved that the deceased was suffering from a pulmonary disease.(b)

§ 582. **Excessive verdicts.**—Verdicts given under this statute have very properly in some cases been held excessive. In *McIntyre v. New York C. R.R. Co.*,(c) the deceased was a widow nearly fifty years old, and left three children—two married, and living by themselves. Her services would command \$1 per day, besides board. Her expectation of life by the tables was ten years. The jury found a verdict for \$3,500. It was held that in all probability, before ten years expired, she would have become dependent on the children, and that the verdict was therefore excessive. In *Lehman v. Brooklyn*,(d) where the suit was by the father for the death of his son four and a half years old, and the verdict was for \$1,500, the damages were held to be excessive, since for ten years deceased would have been a burden, and for the next

western R.R. Co., 41 Ga. 223; *Georgia R.R. Co. v. Pittman*, 73 Ga. 325; *Donaldson v. Mississippi & M. R.R. Co.*, 18 Ia. 280; *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518; *Sauter v. New York C. & H. R. R.R. Co.*, 66 N. Y. 50; *Mulcairns v. Janesville*, 67 Wis. 24; *McKeigue v. Janesville*, 68 Wis. 50.

(*) 76 Ga. 770, 783.

(b) *Columbus & W. Ry. Co. v. Bridges*, 86 Ala. 448.

(c) 47 Barb. 515.

(d) 29 Barb. 234.

seven would have done well if he supported himself, and that the damages should therefore have been nominal. In *Mitchell v. New York C. R.R. Co.*,^(*) the deceased was a wife twenty years old. There was no proof of special damage, nor any evidence of her capabilities, mental or physical, nor of her situation and circumstances in life, nor how she could be of benefit to her husband and next of kin. A verdict of \$4,000 was held to be unauthorized by the proof. A discussion of the correctness of a verdict of \$5,000, where deceased was unmarried and without children, but left next of kin, is to be found in *Bierbauer v. New York C. R.R. Co.*^(b) But the damages were declared insufficient in *Mariani v. Dougherty*,^(c) where the deceased, being a house-painter and paper-hanger, fifty-six years old, who made from four to seven dollars a day, had four sons and one daughter, all of age, except one son ten years old being with and dependent upon his father. The jury gave a verdict of \$200. It was held a "mockery of justice" to assess the damages so low.

§ 583. *Reduction of damages.*—That the acquisition of property by the plaintiff from the death of the deceased cannot be shown in diminution of damages is apparent, from the consideration that there is no advantage obtained, since the property would ultimately vest in the plaintiff on the natural death of the deceased, and that it is for the intermediate pecuniary loss that the action is given by the statute.^(d) In *Sherlock v. Alling*,^(e) an action brought under the statute, the question was raised whether the receipt of a sum of money by the persons for whose benefit the action was prosecuted, on account

(*) 2 Hun 535.

(b) 15 Hun 559.

(c) 46 Cal. 26.

(d) *Terry v. Jewett*, 78 N. Y. 338.

(e) 44 Ind. 184, 200.

of a policy of insurance on the life of the deceased, could be shown to reduce the amount of the recovery, and it was held that it could not, the court saying: "To allow such a defense would defeat actions, under the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children; and the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act."(*) Nor can the damages recoverable by a husband for the death of his wife be reduced by showing that he has married a second wife who performs the services formerly performed by the first wife.(b)

§ 584. **Exemplary damages.**—Exemplary damages cannot generally be recovered in actions for death.(c) So in *Conant v. Griffin*(d) it was said to be erroneous to admit evidence as to the wealth of the defendant, with a view to giving exemplary damages in an action under the statute. In some States, however, such damages are expressly allowed by the statute.(e)

§ 585. **Contributory negligence.**—* In England it has been held that the rule of the common law is applicable

(*) *Acc. Western & A. R.R. Co. v. Meigs*, 74 Ga. 857; *Althorf v. Wolfe*, 22 N. Y. 355; *North Pennsylvania R.R. Co. v. Kirk*, 90 Pa. 15; *Harding v. Townshend*, 43 Vt. 536, where the case of *Hicks v. Newport, A. & H. Ry. Co.*, 4 B. & S. 403, a *Nisi Prius* case. holding the opposite doctrine, is adversely commented on.

(b) *Davis v. Guarnieri*, 45 Oh. St. 470.

(c) *Smith v. London & N. W. Ry. Co.*, 2 E. & B. 69; *Louisville & N. R.R. Co. v. Orr*, 8 So. Rep. 360 (Ala.); *Thompson v. Louisville & N. R.R. Co.*, 8 So. Rep. 406 (Ala.); *Kansas P. R.R. Co. v. Miller*, 2 Col. 442; *Pennsylvania R.R. Co. v. Henderson*, 51 Pa. 315.

(d) 48 Ill. 410.

(e) *Myers v. San Francisco*, 42 Cal. 215; *Chiles v. Drake*, 2 Met. (Ky.) 146; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Kentucky C. R.R. Co. v. Gastineau*, 83 Ky. 119; *Kansas City, F. S. & M. R.R. Co. v. Daughtry*, 88 Tenn. 721; *March v. Walker*, 48 Tex. 372.

to this statute ; that the action is to be treated as if the injured party had brought it ; and that, if his negligence contributed to the disaster, the plaintiff cannot recover.¹ Such, too, is the doctrine in this country. So, in New York, where a lunatic, in charge of his father, was killed by being run over by a railway car ; but it appeared that his death was owing, not to the negligence of the railway company or its agents, but to the carelessness of the father of the lunatic, it was held that no recovery could be had.² But in Texas it has been held that killing a man by making him drink three pints of whiskey was actionable, though the experiment was made with the consent of the deceased.^(*)

¹ *Tucker v. Chaplin*, 2 Car. & Kir. 730.

² *Willets v. Buffalo & R. R.R. Co.*, 14 Barb. 585.

(*) *McCue v. Klein*, 60 Tex. 168.

CHAPTER XIX.

THE MEASURE OF DAMAGES FOR TORTS IN ADMIRALTY.

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| § 586. Rules adopted in admiralty. | § 594. Total loss. |
| 587. Collision—Division of loss. | 595. Value of the vessel. |
| 588. Liability to third parties. | 596. Damage to cargo. |
| 589. Consequential damages. | 597. Costs and interest. |
| 590. Limit of recovery. | 598. Stipulations. |
| 591. Reduction of damages. | 599. Other torts in admiralty—Di- |
| 592. Partial loss. | vision of loss. |
| 593. Earnings of the vessel. | |

§ 586. **Rules adopted in admiralty.**—At common law, if the plaintiff is not in fault, he recovers substantial damages. On the other hand, if the defendant can show him to have been guilty of contributory negligence, he recovers nothing. There is no attempt to apportion the loss. In courts of admiralty, on the other hand, where both parties are in fault, the rule is wholly different; though not strictly within the scope of this treatise, it may be advantageous here, having disposed of the subject of torts at common law, to consider briefly the effect of a different system of rules.

§ 587. **Collision—Division of loss.**—In cases of collision, where both vessels are in fault the sums representing the damage sustained by each, are added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater, and dividing the remainder. The effect of this rule is that the vessel least injured contributes to the extent of half this remainder to the loss of the other vessel. Thus if one vessel is injured to the extent of \$25,000, and the other to the

extent of \$75,000, the first will contribute \$25,000 to the loss of the latter. But this rule is applicable only where both vessels have been injured. If one in fault has sustained no injury, it is liable for half the damage sustained by the other, though that other was also in fault.^(*) The rule is applied also in the case of persons injured by a collision. In *McCord v. The Tiber*,^(b) the Tiber having got aground, a line was stretched across the main channel of the river to aid in getting her off. The plaintiff was piloting a raft down the river, and was struck in the back by the rope, and injured. It was held that both parties were in fault. The court said: "When both parties are in fault, the court apportions the damages between them, according to justice and equity, having due regard to the degree of negligence imputable to each; so that, in admiralty, a party in fault may recover of another party whose negligence contributed to cause the injury, a portion of the damages, while, at common law, a defendant must pay all damages, or none." So where by a collision between vessels mutually at fault a seaman on one of the vessels is injured, he may recover compensation from the other vessel, but only for half his loss.^(c)

(*) *The Agra & Elizabeth Jenkins*, 4 Moore P. C. (N. S.) 435; *The Singapore and Hebe*, 4 Moore P. C. (N. S.) 271; *The Catharine v. Dickinson*, 17 How. 170; *Union S. S. Co. v. New York S. S. Co.*, 24 How. 307; *The Morning Light*, 2 Wall. 550; *The Continental*, 14 Wall. 345; *The Sapphire*, 18 Wall. 51; *The Sunnyside*, 91 U. S. 208, 215; *The America*, 92 U. S. 432; *The Stephen Morgan*, 94 U. S. 599; *The Manitoba*, 122 U. S. 97; *The Pavonia*, 23 Blatch. 403; *The Frisia*, 24 Blatch. 40; *Ralston v. The State Rights*, Crabbe C. C. 22; *The Monticello*, 1 Lowell 184; *The Clover*, 1 Lowell 342; *Foster v. The Miranda*, 6 McLean 221; *Lucas v. The Thomas Swann*, 6 McLean 282; *Cannon v. The Potomac*, 3 Woods 158; *The Alabama*, 4 Woods 48; *La Champagne*, 43 Fed. Rep. 444.

(b) 6 Biss. 409. In this case, the plaintiff was 47 years old, and had a family of five children. The accident disabled him from following his business as a pilot. It was held that he was entitled to \$2,500.

(c) *The Queen*, 40 Fed. Rep. 694.

The rule of division of damages prevails also when the collision is occasioned by inscrutable fault,^(*) and in dividing the damages under this rule, no regard is paid to the difference in value between the vessels.^(b) But if the collision is the result of inevitable accident, each vessel, in this country, must bear her own loss.^(c)

§ 588. **Liability to third parties.**—Where both vessels are in fault, a party whose goods are injured can recover all the damages against the vessel libelled by him, *i. e.*, the principle of the division of the loss applies only as between the colliding vessels.^(d) So where a collision occurred between *The Atlas* and *The Kate*, whereby a canal-boat in the tow of the latter was injured and goods were destroyed, which the libellant had insured, he was allowed to recover the whole amount of the loss against *The Atlas*, the only vessel he libelled.^(e) In the case of *The Juniata*,^(f) it appeared that there had been a collision between *The Juniata*, a steamship, and a tug-boat, by which property of the United States, in the tug-boat's tow, was destroyed. Both the steamship and the tug were at fault. A libel was filed against *The Juniata* alone. It was held that the United States could recover full damages against it, and that *The*

(*) *The Comet*, 1 Abb. C. C. 451; *The John Henry*, 3 Ware 264; *The Nautilus*, 1 Ware, 2d ed. 529; *The David Dows*, 16 Fed. Rep. 154. But *contra*, that where there is a reasonable doubt as to which vessel was to blame there can be no recovery; *The Breeze*, 6 Ben. 14, *per* Blatchford, J.; *The Summit*, 2 Curt. 150, *per* Curtis, J.

(b) *The Nautilus*, 1 Ware, 2d ed. 529.

(c) *Stainback v. Rae*, 14 How. 532; *The Grace Girdler*, 7 Wall. 196; *The Sunnyside*, 91 U. S. 208, 215; *The J. L. Hashbrouck*, 14 Blatch. 30; *The City of Paris*, 14 Blatch. 531; *Ward v. The Fashion*, Newb. Adm. 8; *The Nautilus*, 1 Ware, 2d ed. 529.

(d) *The Bernina*, 13 App. Cas. 1; *Holland v. Brown*, 35 Fed. Rep. 43; *The Britannic*, 39 Fed. Rep. 395.

(e) *The Atlas*, 93 U. S. 302. In Scotland, the loss is apportioned in such a case. *Hay v. Le Neve*, 2 Shaw H. L. 395; *The Washington*, 5 Jur. 1067.

(f) 93 U. S. 337.

Juniata's claim against the tug-boat must be settled in other proceedings. Swayne, J., said: "We should adjudge that half the amount should be paid by the tug, and the other half by the steamer; but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offence being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damages." In *The Alabama* and *The Gamecock*,^(*) on the other hand, it appeared that the libellant's vessel had been injured by a collision between the tow-boat of his vessel, *The Gamecock*, and the steamer *Alabama*, both being in fault. The *Alabama* was bonded in \$100,000, *The Gamecock* in \$10,000. Both offending vessels being before the court, it was held that judgment should be entered against each for a half; but if the libellant could not recover against one all the damage, he could then proceed against the other.^(b)

§ 589. Consequential damages.—Conjectural damages must be excluded.^(c) But necessary incidental expenses and losses are allowed, such as loss of wages, and damage to the vessel from efforts to save her at the time of the collision,^(d) salvage expenses, charges for wharfage while

(*) 92 U. S. 695. The cases of *The Milan*, 1 Lush. 388, and *The Atlas*, 4 Ben. 27, 10 Blatch. 459, which adopt the rule of division of loss, were cited. The court said of them: "It does not appear that any difficulty arose from the inability of either of the condemned parties to pay their share of the loss. No such inability seems to have existed. And when it does not exist, the application of the moiety rule operates justly as between the parties in fault, and works no injury to others. It is only when such inability exists that a different result takes place. The cases quoted, therefore, may have been well decided and yet furnish no precedent for the case under consideration."

(*) *Acc.* *The Frisia*, 24 Blatch. 40; *The Queen*, 40 Fed. Rep. 694.

(c) *The Blossom*, Olcott 188; *The Narragansett*, Olcott 246.

(d) *The Nautilus*, 1 Ware, 2d. ed. 529; *Greenwood v. The Fletcher*, 42 Fed. Rep. 504.

repairing, and the time of those employed in raising and clearing out the vessel.^(*) The owner of the vessel injured by the collision can recover the expenses incurred in retaining his crew and in attempting to save the cargo,^(b) and the expense of a tug to tow the vessel to a port of safety, may be recovered.^(c) And the offending vessel is not exonerated from full damages, because after the wreck a part of the cargo was injured or lost through the efforts of a third party to save it.^(d) A vessel is liable for personal injuries (including loss of life, within Lord Campbell's act), which are the natural and proximate consequence of the collision.^(e) Where the plaintiff's wife is killed by a collision between two vessels, he can recover against the vessel in fault by proceeding *in rem*.^(f)

§ 590. **Limit of recovery.**—Where the full value of the vessel is allowed, as upon a total loss, nothing further will be awarded for demurrage.^(g) But where the vessel was only a partial loss, it was held otherwise by a very able judge, in a case where the repairing of the vessel had been a prudent course, and the necessary repairs and demurrage together exceeded the value of the vessel at the time of the loss.^(h)

§ 591. **Reduction of damages.**—It is no defense to a suit for collision that the loss has been paid by the underwriters. The trespasser has no concern with the con-

(*) *Vantine v. The Lake*, 2 Wall. Jr. 52.

(b) *Hoffman v. Union Ferry Co.*, 68 N. Y. 385.

(c) *The Benjamin F. Hunt, Jr.*, 34 Fed. Rep. 816.

(d) *The Narragansett*, Olcott 246.

(e) *The George and Richard*, L. R. 3 Adm. 466; 24 L. T. R. 717.

(f) *The Sea Gull*, Chase 145.

(g) *The Columbus*, 3 W. Rob. 158.

(h) *The Glaucus*, 1 Lowell 366.

tract with the insurer.^(a) Where, in a case of collision, a decree has been obtained abroad against the offending vessel, but for an amount less than the actual loss, in an action here for the rest of the loss, against the insurance company in which the injured vessel was insured, the amount recovered abroad is to be deducted from the gross damage only, and not from the loss adjusted as a partial loss by deducting one-third new for old.^(b)

§ 592. **Partial loss.**—The general principle followed by the admiralty courts in cases of collision is, that the damages to be assessed against the offending vessel must be sufficient to restore the other to the condition she was in at the time of collision, if restoration is practicable. The reasonable expense of repairing the vessel is therefore recoverable in case of partial loss,^(c) even if the vessel is in some respects stronger and more valuable after the repairs than she was before the collision. The rule of one-third new for old does not apply in case of collision.^(d) The owner cannot sell the vessel as she lies, deduct the price from her value before the collision, and recover the difference.^(e) But the permanent depreciation

^(a) *Yates v. Whyte*, 4 Bing. N. C. 272; *The Monticello v. Mollison*, 17 How. 152; *The Atlas*, 93 U. S. 302, 310.

^(b) *Dunham v. New England M. I. Co.*, 1 Lowell 253.

^(c) *Heard v. Holman*, 19 C. B. N. S. 1; *The Black Prince*, Lush. Adm. 568; *The Gazelle*, 2 W. Rob. 279; *The Clyde*, Swabey 23; *The Inflexible*, Swabey 200; *The Catharine v. Dickinson*, 17 How. 170; *The Granite State*, 3 Wall. 310; *The Baltimore*, 8 Wall. 377; *The Atlas*, 93 U. S. 302, 307 (*semble*); *The Blossom*, Olcott 188; *The Lotty*, Olcott 329; *The Narragansett*, Olcott 388; *The New Jersey*, Olcott 444; *The Rhode Island*, Olcott 505; *The City of Chester*, 34 Fed. Rep. 429; *Seabrook v. Raft of R.R. Cross-ties*, 40 Fed. Rep. 596; *Comerford v. The Melvina*, 43 Fed. Rep. 77; *Minor v. The Pica-yune*, 13 La. Ann. 564; *Atchison v. The Doctor Franklin*, 14 Mo. 63; *Mailier v. Express Propeller Line*, 61 N. Y. 312.

^(d) *The Pactolus*, Swabey 173; *The Catharine v. Dickinson*, 17 How. 170; *The Baltimore*, 8 Wall. 377 (*semble*).

^(e) *The Catharine v. Dickinson*, 17 How. 170.

in value is an item of compensation, in addition to the cost of repairs.^(a)

§ 593. **Earnings of the vessel.**—No compensation can be recovered for the loss of uncertain and contingent profits.^(b) But in the sense of earnings of which the vessel is certainly deprived during the repairs, they are allowed.^(c) So in the case of *Heard v. Holman*,^(d) the general measure of damages is declared by Erle, C. J., approving the rule there recognized in admiralty, to be “the expenses of repairs rendered necessary by the collision, and also compensation for the loss of profits they would have made from the use of their vessel if the collision had not occurred.” Where a vessel is engaged in carrying freight at the time of the collision, the rate of freight she could have earned, deducting expenses, during the time required for repairing, is a proper measure of damages; and if she were not carrying freight at the time, but might have been chartered during the period of the repairs, the market price of the hire of the vessel affords a rule.^(e) In the absence of direct evidence of

(a) *The Favorita*, 4 Ben. 132; *The Transit*, 4 Ben. 138.

(b) *The Clarence*, 3 W. Rob. 283; *Smith v. Condry*, 1 How. 28; *The Vaughan and Telegraph*, 2 Ben. 47; *The Ocean Queen*, 5 Blatch. 493; *Steamboat Co. v. Whilldin*, 4 Harr. 228; *Cummins v. Presley*, 4 Harr. 315; *Minor v. The Picayune*, 13 La. Ann. 564.

(c) *The Argentino*, 14 App. Cas. 519 (H. of L.); *The Black Prince*, Lush. Adm. 568; *The Gazelle*, 2 W. Rob. 279; *The Inflexible*, Swabey 200; *Williamson v. Barrett*, 13 How. 101; *The Rhode Island*, 1 Abb. Adm. 100; 2 Blatch. 113; *The M. M. Caleb*, 10 Blatch. 467; *The Narragansett*, Olcott 388; *Vantine v. The Lake*, 2 Wall. Jr. 52; *The James A. Dumont*, 34 Fed. Rep. 428. A similar rule prevails in the common-law courts. *Shelbyville L. B. R.R. Co. v. Lewark*, 4 Ind. 471; as also in the analogous case of the detention of a vessel from an unlawful obstruction to the navigation. *Jolly v. Terre Haute D. B. Co.*, 6 McLean 237.

(d) 19 C. B. N. S. 1.

(e) *Star of India*, 1 P. D. 466; *Williamson v. Barrett*, 13 How. 101; *The Colorado*, 1 Bro. Adm. 411; *The Stromless*, 1 Low. 153; *Mailler v. Express Propeller Line*, 61 N. Y. 312.

earnings, it has been said that interest on the value of the vessel may be allowed for the time occupied in repairing.^(*) The rate of demurrage in the charter-party of the injured vessel, being *res inter alios*, is not evidence of the value of her use.^(b) The allowance must not extend beyond the time necessarily lost ;^(c) but if the damage was such as to make it reasonable to go into port for repairs before proceeding with the voyage, the loss of time thereby caused may be compensated.^(d)

§ 594. **Total loss.**—If the injured vessel is a total loss, her market value at the time will be the criterion of damages.^(e) Where the vessel was a total loss, and was raised at an expense of \$1,000, it was held that this sum, less the amount for which the wreck was sold, could be recovered, as it could only be ascertained by raising the vessel that she was a total loss.^(f) But if it would cost more to raise a sunken vessel than the wreck would be worth, the plaintiff can recover as for a total loss without raising her.^(g)

§ 595. **Value of the vessel.**—In *The Granite State* ^(b) it was said that there is no established market value for boats, barges, and other articles of that description, as in the case of grain, cotton, or stock, and their loss cannot be measured by the ratio of their profits, since the loss of an old hulk of little value, which was mak-

(*) *The Rhode Island*, 2 Blatch. 113.

(b) *The James A. Dumont*, 34 Fed. Rep. 428.

(c) *The Thomas Kiley*, 3 Ben. 228 ; *Seabrook v. Raft of R.R. Cross-ties*, 40 Fed. Rep. 596.

(d) *Comerford v. The Melvina*, 43 Fed. Rep. 77.

(e) *The Ann Caroline*, 2 Wall. 538 ; *The Rebecca*, Blatch. & H. 347 ; *The New Jersey*, Olcott 444.

(f) *The Mary Eveline*, 14 Blatch. 497 ; *acc. The Empress Eugenie*, Lush. Adm. 138.

(g) *Blanchard v. New Jersey S. B. Co.*, 59 N. Y. 292.

(h) 3 Wall. 310.

ing or might make considerable profits, might be supplied at a price much less than one proportioned to such profits. In the absence of a market, resort may be had to the judgment of persons acquainted with the business and values involved; (*) if there is a market value, that governs. (b) In *Blanchard v. New Jersey S. B. Co.* (c) it was held, that evidence of the value of other vessels, with which the plaintiff's vessel could be compared, was not admissible to prove the value of the plaintiff's vessel. In *The City of Alexandria* (d) it was held that, there being no market value, the cost of the vessel might be shown as some evidence of value.

§ 596. *Damage to cargo.*—The damages to the cargo are to be made good. (e) Where it is a total loss, its value is the measure. (f) This value, it has been held in a comparatively early case, in analogy to the rule in the case of carriers, was to be estimated at the port of destination, at the time when, in the ordinary course of things, it would have been delivered. (g) But by the rule now prevailing, it seems settled that the value must be taken at the port of shipment, and on this sum interest may be allowed; (h) also the expense of lading the cargo and transporting it to the place of collision. (k) This corresponds to the rule in prize cases. (l) The general question has been considered in a case of salvage in the U. S. District Court

(*) *The Transit*, 4 Ben. 138; *The Emilie*, 4 Ben. 235.

(b) *The Colorado*, 1 Bro. Adm. 411.

(c) 59 N. Y. 292.

(d) 40 Fed. Rep. 697.

(e) *The Narragansett*, Olcott 388.

(f) *Porter v. Allen*, 8 Ind. 1.

(g) *The Joshua Barker*, Abb. Adm. 215.

(h) *Smith v. Condry*, 1 How. 28; *The Scotland*, 105 U. S. 24.

(i) *The Vaughan & Telegraph*, 2 Ben. 47; *The Ocean Queen*, 5 Blatch.

493.

(l) *The Amiable Nancy*, 3 Wheat. 546, 560; *The Lively*, 1 Gall. 315.

for the Southern District of New York.^(*) In this case the co-libellants were owners of a cargo of fruit on board of the libellant's vessel, the Etna. The Colon had broken some of her machinery, and the Etna rendered her salvage services in towing her into port. This delayed the Etna, so that the fruit spoiled. Choate, J., held that the fruit had, in effect, been sacrificed at the request and for the benefit of the Colon. In regard to the measure of damages, after stating that the general rule for property lost or destroyed at sea was its value at the port of shipment, with the cost of transportation to the place where it was lost, the judge said :

"It is true that this rule of damages is firmly established in cases of property lost or destroyed *before it reached port*. It is held that the value it would have had, if it had reached port in safety, cannot be considered in determining its value at the place of loss, because it is a mere possibility that it would have ever reached port, even if it had not been lost as it was lost. The rule has been adopted as excluding mere speculative profits, and as furnishing a convenient and, in its general application, a fair measure of the value of the property lost or destroyed at sea. But there is no reason for applying the rule in this case. The goods *did* arrive. They were *not* lost at sea. The question is what damage the owner has sustained by receiving them in the condition in which they were delivered on the day of their arrival instead of in the condition they were in on the day when they would have arrived but for the detention. . . . To allow this difference in value to the owners is not to allow them speculative profits. It is simply to allow them the amount of loss which, at the request and for the benefit of the Colon, the owners have suffered. The rule alluded to has, it is believed, not been applied where goods have arrived after suffering injury at sea."

In *Dyer v. The National Steamship Co.*,^(b) the Republic of Peru, as co-libellant, claimed damages for the

(*) *Atlas S.S. Co. v. The Colon*, not reported in the District Court ; reported on appeal, 4 Fed. Rep. 469; 18 Blatch. 277.

(b) 7 Ben. 395.

loss of a cargo of guano through the collision of the libellant's vessel with a vessel belonging to the respondent. The sale of guano was a monopoly belonging to the government of Peru. The guano was exported by the government, and its exportation by other parties was prohibited. Peruvian subjects were allowed to dig the guano for use in Peru alone. A little of it so dug was sold in Peru for \$12 a ton, gold, but subject to the limitation that it should not be exported. Beyond this, there was no market for it in Peru. The cargo was lost just outside the harbor of New York. If it had arrived in New York, it would have sold for \$60 a ton, in gold. Benedict, J., admitting the general rule above stated, held the principle of indemnity was a higher law to which the general rule must yield; that resort to the latter in this case would violate the former, and that, therefore, the value at New York, less the costs and charges which would have been incurred from the time and place of the loss to its arrival in New York, must be taken in determining the loss to the Republic of Peru. But on appeal to the Circuit Court, this decision was reversed.^(*) Blatchford, J., after stating the general rule, said:

"Indemnity for loss, in the sense of the law of damages, is indemnity to a party for his having lost what he once had. In common speech, a party may lose a market, or may lose an expected profit. But that is not correct language to use in considering the law of damages. The value of this cargo of guano at the time and place of loss did not embrace any part of the profits which would have been realized on the cargo if it had safely reached New York. It is impossible to take the market price at New York as the standard, without taking in the probable and prospective profits. To say that this cargo could have been sold, to arrive, or could have been easily exchanged for gold at a large price at the time and place of the loss, does not

(*) 14 Blatch. 483, 490.

meet the difficulty. Selling the cargo to arrive, is only selling it to be paid for if and when it arrives, and leaves it subject to the contingencies of the voyage; and if it never arrives, the price, which is a New York price and includes profits, is not paid. . . . The contingency of a safe arrival of the cargo at New York, so as to enable its owners to realize their probable or prospective profits, was during the whole voyage a matter of conjecture, and the result shows that there was not any less peril so near to New York than during the prior part of the voyage. To allow such profits in this case would make it necessary to allow them, if the cargo had been lost by a collision close to the Chincha Islands, and would establish a rule which the Supreme Court rejected in *Smith v. Condry*."

The owners of the cargo had cited two cases in support of the proposition, that the value should be the value in the port of destination, less the cost of transporting it from the place where it was lost to its destination. In the first case, *Bourne v. Ashley*,^(*) the question arose as to the market value of a whale converted in the Okhotsk Sea. In the second, *Swift v. Brownell*,^(b) a cargo of oil and bone had been lost in the Arctic Ocean by collision. It was held in both cases that the value must be ascertained by reference to the market value at New Bedford, the port of destination and the controlling market in the country. Blatchford, J., then said :^(c)

"Both of those cases proceed upon the principle that, if there is an ascertainable market value for the cargo at the time and place of the loss, that ascertainable market value is to govern; and that, if there is no such ascertainable market value, and yet the cargo is of value to its owner, the wrong-doer cannot escape by showing that there is no such ascertainable market value. But to show that there is no such ascertainable market value, it is not sufficient to show that the place of loss was on the high seas, where traffic does not take place, and buyer and seller do not meet in market. . . . The cases of the whale and of the cargo of oil and bone were exceptional cases. The articles in

(*) 1 Lowell 27.

(b) 1 Holmes 467.

(c) At p. 492.

question in those cases were not shipped at any port of shipment where traffic in them did or could take place, and no value at the time and place of loss, predicated upon any value at any port of shipment, could be affixed to them. Whales and their products commence their existence as property on the high seas, and their value, if to be dealt with as a value of the property in some market, could in those cases be dealt with only as a value in the port of New Bedford. The property had never been in a port, or at a place where any definite or ascertainable value had been or could be given to it as a market value. Not so with this cargo of guano. . . . The value of this guano, at the time and place of loss, based on its value in Peru, can, I think, be ascertained from the evidence in such manner as to give to its owner such fair indemnity, and yet not limit it to the recovery of only \$1,424.25, as the expense of shipment, with no value in the guano itself. This can be done without conflicting with the general rule. Because the Peruvian government paid nothing for the guano, it does not follow that no value, as substantially a market value of it in Peru, can be ascertained."

He then said that this value must not be based on exceptional sales, but on the testimony of experts, and referred to that of Mr. Hobson, who, in answer to a question as to what he considered the value of such an article as guano in Peru, in reference to the net proceeds of its sale in the United States, replied, that, looking to a fair average profit, he should think it would be worth from 10 to 12 per cent. off from the net proceeds. The judge then said :

"The government of Peru, in respect to its guano, was a merchant, exporting it and selling it in the market of New York, and making a mercantile profit on it. To be sure, the government made a larger profit on it than the mere mercantile profit, and which larger profit included the mercantile profit ; but the value in Peru, which is to be ascertained, is the value of the guano as an article to be dealt with there by a merchant seeking to export it, and realize only a fair mercantile profit on it. That value is the proper value in this case, and can be readily ascertained in the method testified to by Mr. Hobson. . . . In every

case, where market value abroad is sought to be ascertained, and there is no standard by sales abroad, that method of ascertaining such market value, or its equivalent, must be resorted to, which, under all the circumstances of the particular case, furnishes the nearest approach to such value abroad, as that a fair mercantile profit, and no more and no less, will be allowed to the merchant, in view of the net proceeds at the place of importation."

§ 597. *Costs and interest.*—In admiralty, costs are in the discretion of the court.^(*) Interest is allowed as in actions at common law.^(b)

§ 598. *Stipulations.*—The judgment in admiralty cannot generally exceed the amount of the stipulation given for the discharge of the vessel, for that is all that is within the jurisdiction of the court.^(c) And a stipulator, unless personally guilty of default or contumacy, cannot be held liable for more than the amount of his stipulation; even on appeal, the costs recoverable are limited to the stipulation for costs and the appeal bond.^(d) The stipulated sum cannot be increased by the allowance of interest.^(e)

§ 599. *Other torts in admiralty—Division of loss.*—The measure of damages in an action of tort brought in an admiralty court offers in general no peculiarity in the measure of damages. But the rule of the division of loss has lately been held to apply in the case of personal torts. As a result, a party suing in an admiralty court for any tort, though he was guilty of contributory negligence, is allowed to recover for half his loss.

(*) *The Sapphire*, 18 Wall. 51.

(b) *The Hebe*, 2 W. Rob. 530; *The Swallow*, Olcott 334; *The James A. Dumont*, 34 Fed. Rep. 428.

(c) *The Webb*, 14 Wall. 406.

(d) *The Wanata*, 95 U. S. 600.

(e) *Hemmenway v. Fisher*, 20 How. 255; *The Ann Caroline*, 2 Wall. 538. But in *The Manitoba*, 122 U. S. 97, the amount allowed seems to have been the amount of the stipulation bond, with interest.

This doctrine was first laid down by the Supreme Court of the United States in *Atlee v. Packet Co.*,^(*) where the plaintiff sued for injury to his vessel by an obstruction placed in the river by the defendant. The plaintiff himself was in fault, though not perhaps to so great a degree as would have been held to be contributory negligence. It was held that the loss should be divided. Miller, J., said :

"The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. . . . An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the Admiralty Court, where there has been such contributory negligence, or in other words, where both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff, who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum. It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially." ^(b)

The rule was soon extended to cover actions for personal injury where the injured party had himself been negligent ; although the case of *Atlee v. Packet Co.* was

^(*) 21 Wall. 389, 395.

^(b) *Acc. Mould v. The New York*, 40 Fed. Rep. 900.

not at first cited as an authority.^(*) The whole subject was elaborately considered by Wallace, J., in *The Max Morris*.^(b) After citing previous cases in which the point in question had been discussed, the learned judge said:

"The rule of admiralty in collisions, apportioning the loss in case of mutual fault, is peculiar to the maritime law. It is not derived from the civil law, which agrees with the common law, in not allowing a party to recover for the negligence of another where his own fault has contributed to the injury. It emanated from the ancient maritime codes, and the reasons which are assigned by commentators, as commending it, are various and divergent. . . . If no trace is to be found of any doctrine of liability or rule of damages in cases of marine torts which is peculiar to the admiralty, except that which obtains in cases of collision, and has exclusive reference to the conduct of ships towards each other and the faults or accidents incident to their navigation, resort may be had to the principles or analogies of the common law or of the civil law, when a new question arises. . . . As has been stated, both the common law and the civil law agree in denying a right of recovery for negligence, when the negligence of the party injured has concurred in producing the injury. The reason for the rule is sometimes said to be based upon grounds of public policy, which require, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected; but the reason more commonly assigned why contributory negligence is never considered in mitigation of damages, but is deemed a complete defense, is, because the law has no scales to determine, in such cases, whose wrong-doing weighed most in the compound that caused the mischief. It would seem that either of the reasons assigned should be as controlling with a court of admiralty as in a court of common law. It is also to be observed that the rule relates to the cause of action and denies any right of recovery, and is not one of damages, for ascertaining what measure of compensation should be awarded."

The learned judge then said that the question was re-

(*) *The Explorer*, 20 Fed. Rep. 135; *The Eddystone*, 33 Fed. Rep. 925.

(b) 24 Blatch. 142, 144.

moved by the cases of *The Explorer* and *Atlee v. Packet Co.*, and reached this conclusion :

“Upon these views of the law, the collision rule for dividing damages can no longer be considered as applicable only to cases involving the rights and responsibilities of parties for colliding vessels. The principles enunciated apply to all cases of marine tort founded upon negligence, without regard to any peculiar considerations of maritime policy for regulating the conduct of ships towards each other, or to any exceptional rules of practice adopted by the admiralty courts, because of the intrinsic difficulty, in collision cases, of locating the fault or the cause of the disaster.”

CHAPTER XX.

THE MEASURE OF DAMAGES IN ACTIONS ON CONTRACTS.

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INTRODUCTORY.

§ 600. Actions upon contracts.—Having thus considered the general rules which govern and limit compensation in all cases, and the particular rules applicable in actions founded on tort, we now proceed to consider the great class of cases relating to actions founded on breach of contract. These actions generally grow out of negotiable paper, policies of insurance, the sale and warranty of

chattels, contracts of agency, service, suretyship, or other express executory agreements, written or verbal, as well as those implied contracts where the law implies a quasi-contractual liability from the acts of the parties. These subjects will be considered separately; but before doing so, it will be necessary to state the general rules upon which the English and American law proceed in all cases *ex contractu*—rules which are themselves dependent upon and will be frequently found to throw additional light upon those great general principles as to certainty, remoteness, and other limits of recovery which lie at the root of our whole system of compensation.

In the present chapter contracts relating to real estate will not be considered. Although these are governed by the same general principles which affect all contracts, these principles are in the field of real estate more obscured by rules drawn from or affected by the feudal law. Understanding first the broad principles by which damages on any ordinary breach of contract are measured, we shall be the better prepared to comprehend a more complex and arbitrary system.

§ 601. Distinction between tort and contract.—* It was the constant and sedulous object of the common law to draw a distinct line between actions of contract and those of tort, *ex contractu* and *ex delicto*; and the rigor with which this distinction was maintained in regard to joinder of counts, causes of action, and election of actions, is familiar learning.**

* Again, as to the rules of evidence, while it is perfectly true that in actions of tort every attendant circumstance of aggravation can be given in evidence: on the other hand, nothing is better settled than that in actions of contract the parties are limited to the mere evidence of the breach of contract. But if damages are to be awarded

on account of the oppressive, malicious, or fraudulent conduct of the defendant, it is manifest that this rule cannot be maintained ; if one party gives evidence of such a character, it is plain that the other must have the right to rebut the testimony, and in this way the form of the action, the issue *ex contractu*, and the rules of testimony, would be completely lost sight of. If, at the trial, the evidence of a breach of contract were complete, certainly an offer to show that the defendant's act was dictated by a malicious, fraudulent, or oppressive spirit, would not be allowed ; and it is very clearly inadmissible to consider, as in evidence for the purpose of regulating the damages, testimony incidentally introduced, which could not be directly given.**

§ 602. *Distinction not destroyed by new system of pleading.*—The modern system of pleading under which the old forms of action have disappeared might perhaps be expected in time to destroy the distinction between tort and contract. But there are many reasons for not anticipating this. No doubt in many cases,—*e. g.*, cases against carriers,—it is now often impossible to tell from the pleadings whether the proceeding sounds in tort or contract ; but the breach of the contract here is of a peculiar kind. The contract is one made in pursuance of a public duty imposed upon the carrier ; his breach of contract is therefore here in a certain sense a tort, at least in many cases. But the inherent difference between a breach of an agreement between parties, and that sort of a breach of duty which we call a tort, is as old as the law itself. It is believed, too, that as a general rule the measure of damages in one case is necessarily different from the measure of damages in the other. To put the plaintiff in the same position as if the contract has not been broken is the object in cases of contract ; whether the contract is broken by accident or by

fraud can make no difference. As long as the action is brought to obtain compensation for the *loss of the contract*, the circumstances attending the breach cannot affect the result. But if the cause of action is a tort, the plaintiff must obtain full compensation for an *act* or *series of acts*, the full effect of which cannot even be understood unless we know every circumstance of aggravation and mitigation. The action for breach of promise of marriage is an undoubted exception to the truth of this general observation; but this action is an anomaly in every respect, and unknown to other systems of law. It may be said that redress should be given for bringing about a breach of contract through duress, or fraud, or other oppression, and so we conceive it would; but in such an action, the damages for the loss of the contract would be one thing, and the damages for the wrong another.^(*)

§ 603. *Motive not considered.*—It may be considered, then, to be established that the motives of the defendant in breaking his contract are to be disregarded, and consequently exemplary damages are not recoverable.^(b) The few exceptions are considered later. This rule was not established until comparatively recently.

* “There are instances,” says Mr. Chitty, in his very valuable work on Contracts,¹ “in which the defendant

¹ Page 684.

(*) The rule of intervening cause produces a different result in tort and contract. In the former, the operation of the intervening cause may affect the right of action, and prevent any recovery; in the latter, where there is a breach of contract, but the intervening cause is the one to which loss is due, the plaintiff still recovers, though only a nominal sum. For an example, *cf.* *Lowery v. W. U. T. Co.*, 60 N. Y. 198, with *First Natl. Bank of Barnesville v. W. U. T. Co.*, 30 Oh. St. 555.

(b) *Bain v. Fothergill*, L. R. 7 H. L. 158; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Toledo, W. & W. Ry. Co. v. Roberts*, 71 Ill. 540; *Duche v. Wilson*, 37 Hun 519; *Houston & T. C. R.R. Co. v. Shirley*, 54 Tex. 125.

may be regarded in the light of a wrong-doer in breaking his contract; and in such case a greater latitude is allowed the jury in assessing the damages"; and he refers to a case¹ of an action of debt on bond given to resign a living, where the defendant refused to perform the condition of his agreement, but without any circumstances of aggravation, and the court, on a motion for a new trial, said that the defendant being a *wrong-doer*, the jury were not bound to fix their verdict at the precise value of the living to him; and on the further ground that the plaintiff had offered to waive all damages if the defendant would resign the living, they refused a new trial.

This, which is the only English authority cited for the position, is very far from supporting the doctrine of Mr. Chitty's text; and it must in all cases require very clear and stringent authority to warrant so great a disturbance of settled principles.**

But, in South Carolina, the question was discussed at large, and the ground distinctly taken, that, even in cases of assumpsit, damages will be given on the ground of fraud. The high authority of the courts of that State demand for their decisions a somewhat extended notice. An action of assumpsit was brought there, to recover damages upon the sale of cotton, alleged to be fraudulently and falsely packed by having the cotton in the centre of the bales wet. It was sent to Liverpool and sold as sound cotton at the then current price. After the sale the fraud was discovered, and the cotton returned, and resold as damaged at a considerable loss. The defendants contended that, if liable at all, the plaintiffs could only recover the price paid at Charleston, with interest. The presiding judge, however, instructed

¹ Lord Sondes *v.* Fletcher, 5 B. & Ald. 835.

the jury that they might give a verdict for the whole amount of damages that the plaintiffs had sustained, which was the difference between the two sales in Liverpool, with interest. The jury having found a verdict according to the direction of the court, on motion for a new trial, the court, by Mr. Justice Nott, said :

“ Assumpsit is *nomen generalissimum*, under which a great variety of special cases are embraced. The damages to be recovered must always depend on the nature of the action and the circumstances of the case. In an action for money had and received, the actual amount of money received (with interest in some cases) should be the measure of damages ; in an action for goods, or any specified chattel sold and delivered, the value of the thing sold ; and so on in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud and other cases merely *sounding in damages*, the jury may give a verdict to the whole amount of the injury sustained or *imaginary damages*.”

After commenting on the case of an action for a breach of promise of marriage, and other English cases, the court proceeded :

“ I apprehend that, after all these cases, it can no longer be considered, as has been somewhat confidently asserted in this case, that even *vindictive damages* may not be given in an action of assumpsit ; and surely it will not be denied that the plaintiff may recover the amount of the loss *which he has actually sustained*.”¹

Two judges dissented. And in a subsequent case of covenant, on a bill of sale of a negro, warranting his soundness (the breach assigned being the unsoundness of the negro), the judge charged that the only measure of recovery was the amount of consideration mentioned in the deed, and interest.² A motion was made for a new trial, and the court, referring to the previous case, said :

¹ *Rose v. Beatie*, 2 N. & McC. 538, 542.

² *Garrett v. Stuart*, 1 McC. 514.

"This, it will be recollected, is an action of covenant, an action *sounding altogether in damages*, and the measure of recovery is to the extent of the injury which the party sustains by the infraction of the covenant, whether it be partial or total, and must necessarily depend on the particular circumstances of the case. Although the consideration paid might in most cases constitute the best evidence of the injury which a party sustained ; yet, in actions *sounding altogether in damages*, it seems to me to follow of necessity that the measure of recovery must depend on the particular circumstances of the case."

And a new trial was granted.^(*) Again, in another case, an action being brought by mechanic for work and labor, etc., in the erection of a house for the defendant, the jury having allowed an arbitrary sum of double the amount of interest due, the verdict was set aside, the court saying :

"There is no doubt that damages at the discretion of the jury may sometimes be given in an action of *assumpsit*, as where the action is founded in fraud or deceit, or when a party fails to perform a contract, by which the other party sustains a special damage, or where it is so badly performed as to frustrate the expectations of the party for whose benefit it was intended. . . . But in no case where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself, furnishes the standard of assessment, are the jury allowed to give more than the

(*) The case of *Hawkins v. Coulthurst*, 5 B. & S. 343, was an action to recover from the assured the amount of a policy of insurance on his life, on which he was to pay the premiums, and which he had assigned to trustees for his creditors, by a deed containing a covenant that he would not do anything to avoid the policy, which covenant he broke by going beyond the limits of Europe without a license from the directors, contrary to a provision in the policy, which was thereby avoided. The plaintiff's counsel, relying on the doctrine of *Mr. Chitty*, cited in the text, insisted that the damages were to be assessed on the highest principle, and that the plaintiffs were entitled to recover the full amount of the policy. But the court held that its value only could be recovered, making allowance for the premiums which the defendant had covenanted to pay.

amount received, with interest, or the value of the articles delivered or services rendered."¹

The English authorities referred to in the first of these cases are *Nurse v. Barns*,² *Stuart v. Wilkins*,³ and *Williamson v. Allison*,⁴ neither of which seems to bear upon the question. But what appears more fatal than the absence of express authority is the general system of our jurisprudence, and the fact that if this rule of damages applies to one form of the action of assumpsit, it must equally apply to all; and that if it be sound, no reason whatever can be assigned why vindictive damages should not be given for the malicious or fraudulent refusal to pay a promissory note; and to carry it to this extent would virtually revolutionize not only our rules both of pleading and of evidence, but introduce most serious innovations in the general rules which regulate the rights of parties. And so the law is now well settled.

§ 604. Common-law principles in cases of contract.—

* "Damages are recoverable in every personal action which lies at the common law."⁵ The language of the civil law is, *Loco facti impræstabilis succedit damnum et interesse*. We have already considered the subject of nominal damages and seen how far the courts go for the mere purpose of declaring a right. We are now to examine those cases of contract where substantial relief is demanded; and the two cardinal principles which will be found to pervade and regulate this branch of our subject, are, *First*, that the plaintiff must show himself to have sustained damage, or, in other words, that actual compensation will only be given for actual loss; and, *Secondly*, that the contract itself furnishes the measure

¹ *Ferrand v. Bouchell*, Harper 83.

² T. Raym. 77.

³ Douglass 18.

⁴ 2 East 446.

⁵ *Sayer on Damages*, ch. 1, p. 6.

of damages. These two rules are closely interwoven with each other, and it is impossible to consider them altogether separately. The first rule is one of great importance. It excludes a large class of cases in which relief is often sought before an injury has occurred; and we shall have frequent occasion to refer to it.** * This rule is, however, not without exception, as we shall hereafter see. The second rule, that the contract itself furnishes the measure of damages, is of equal importance. We have already adverted to it generally, but we have now to consider it more fully, and at the same time to notice such exceptions to it as may be found to exist.**

§ 605. *Vague discretion of jury formerly.*—* We have already had occasion to observe the vague discretion that in the early books is attributed to the jury in the matter of damages. Thus, in a case already referred to, as late as the reign of James I, where the plaintiff sued the defendant on a covenant that if certain land conveyed to him by the defendant fell short of a specified measurement, he, the defendant, would pay a fixed sum for every deficient acre, and alleged that the number of acres wanting would have amounted to the sum of £700, and the jury gave but £400 damages,—it was held, that this was well found; and it was said, “If *all* the land was wanting, *still the jury are chancellors*, and can give such damages as the case requires in equity.”¹

So, even as late as the middle of the last century, in an action for escape against the sheriff, Lord C. J. Wilmot said that in actions on the case, the damages are “totally uncertain and at large.”² So, a standard text-writer³ uses this language:

“In all actions which sound in damages, the jury seem to have

¹ Sir Baptist Hixt's Case, 2 Roll. Abr. 703 (Trial pl. 9.)

² Ravenscroft v. Eyles, 2 Wils. 295.

³ Bacon Abr. Tit. Damages, D.

a discretionary power of giving what damages they think proper; for though in contracts the very sum specified and agreed on is *usually* given, yet if there are any circumstances of hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider of them, and proportion and mitigate the damages accordingly; as in case upon a policy of assurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel, and about £1,500 insured on it, and then the ship was voluntarily sunk."

There can be no stronger proof of the revolution that has been effected in this branch of our law, than is furnished by this citation. Here, even on promissory notes, the jury are said to have power to give a sum less than that expressed in them; and a contract which now the law would pronounce utterly void, is declared to be a matter for the mere discretion of the jury.**

§ 606. Compensation now a question of law.—* It is, in truth, but slowly and at comparatively a recent period that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages. But, by degrees, the salutary principle has been recognized, and it is now well settled, that in all actions of contract, subject to the exception already noticed, and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.

It is, in fact, indispensable that it should be so: the measure of damages is the gist of the remedy; the remedy is no part of the facts of the cause, while, on the other hand, it so completely controls the rights of the parties, that, if any absolute discretion be given to the jury over the amount of compensation, the power of the

court over questions of law would be most emphatically a barren sceptre. The measure of damages in all cases, then, where no complaint is made of evil motive, is a pure question of law; in all cases of contract, the sole object of the court is to ascertain the agreement of the parties, and that agreement, as a general rule, controls the measure of remuneration. "In contracts," said the Supreme Court of Massachusetts,¹ "where the precise sum is fixed and agreed on by the parties, as in many actions of assumpsit and of covenant, the jury are confined to that sum." **

* It is urged, says the Supreme Court of Pennsylvania, that the standard furnished by the contract "may be resorted to as *a* measure of damages, but not as *the* measure. If it be not the *exclusive* measure, it must be disregarded altogether. If it be but one of many standards, then there is no standard at all, or as good as none. The jury are without a rule when they have their choice between different rules." * "There are certain established rules," says the Court of Exchequer in England, "according to which the jury ought to find. And here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken." *

"It is desirable," says the Supreme Court of Massachusetts, "to have as definite and precise rules upon the subject of damages as are practicable." * "A proper administration of justice requires that the rules established by law for the assessment of damages should be adhered to," says the Supreme Court of Louisiana. *

¹ Leland v. Stone, 10 Mass. 459.

⁴ Batchelder v. Sturgis, 3 Cush. 201.

² McDowell v. Oyer, 21 Pa. 417.

⁵ Arrowsmith v. Gordon, 3 La. Ann.

³ Alder v. Keighley, 15 M. & W. 117. 105.

EXPRESS CONTRACT.

General Principles.

§ 607. **Preparations to perform.**—As we shall presently see, the general rule is that the plaintiff recovers the sum total of the benefits or gains of a contract *less* the expenses. Hence he cannot recover for the expense of preparations to commence performance of the contract, for he would have equally incurred those expenses if the defendant had performed his part.^(*) Where, however, the rule that the plaintiff shall recover the profits he would have made by his contract does not apply, as, when they are uncertain, he is allowed to recover the expenses incurred by him in his preparations to perform.^(b) So where the plaintiff agreed to supply laborers for the defendant at \$1.25 per day, and expended money in procuring laborers, but the defendant refused to hire them, no damages being provable for loss of profits of the contract, the plaintiff was allowed to recover the expense of procuring the laborers.^(c) So in an action for breach of contract to submit the claims of the parties to arbitrators, although it was found that the plaintiff had no claim, and, therefore, that the right was probably of very small value, he was allowed to recover “expenses to which he has been subjected by reason of his necessary preparations for a trial before the arbitrators, on account of his own loss of time and trouble, and in employing counsel, taking depositions, payments to witnesses and arbitrators,” and other expenses, his recovery, however, being limited to

(*) *Benziger v. Miller*, 50 Ala. 206; *Mason v. Ala. Iron Co.*, 73 Ala. 270; *Williams v. Oliphant*, 3 Ind. 271; *Noble v. Ames Mfg. Co.*, 112 Mass. 492; *Curtis v. Smith*, 48 Vt. 116.

(b) §§ 197, 198.

(c) *Mandia v. McMahon*, 17 Ont. App. 34.

these expenses only so far as these preparations would not be available for the trial of his cause before the ordinary tribunals. Generally, the proper rule would be the expense of proceeding before the ordinary tribunals in excess of that of proceeding before arbitrators.^(*) So where it was found impossible to estimate the profits of a contract to build a railroad, the plaintiff was allowed to recover for the abrupt termination, for loss of material, for shanties put up, travel of hands, depreciation in value of tools, materials, etc.^(b) If there is an express contract to pay any expenses incurred, of course the defendant is liable to the plaintiff for the amount.^(c) So, also, where there is an implied contract, for instance, where the United States had agreed to pay the defendant for services, and to give him due notice beforehand of the time when performance would be required. Notice was given, but performance was not required. The plaintiff was not allowed to recover the profits he would have made, but was allowed to recover for injury suffered by making ready to meet the requirements of the contract, which would include damages for "loss of time," "trouble and expense." The notice seems to have been treated as an implied promise to pay for expenses incurred if performance was not required.^(d)

Noble v. Ames Manufacturing Co.^(e) was an action for breach of a contract. The offer was: "I am ready to offer you a foreman's situation as soon as you may get here." It was held that the plaintiff could not recover the expenses of his journey from the Sandwich Islands

(*) *Pond v. Harris*, 113 Mass. 114; *acc. New Haven & N. Co. v. Hayden*, 117 Mass. 433.

(b) *Phillips & C. C. Co. v. Seymour*, 91 U. S. 646.

(c) *Tufts v. Plymouth G. M. Co.*, 14 All. 407.

(d) *Bulkley v. U. S.*, 19 Wall. 37.

(e) 112 Mass. 492.

to Massachusetts, nor the value of his time in the journey. Morton, J., said: "The expenses of the removal were incurred before the contract took effect." In *Curtis v. Smith*,^(*) the plaintiff, a builder, had agreed to furnish stone and to build some wing walls for the defendant's bakery, to be commenced when the stagings were taken down. Before they were taken down, the defendant terminated the contract. The plaintiff had performed some labor in getting out stone. The court said, that if the intention was that the quarrying should not be commenced till after the staging had been taken down, then the plaintiff could only recover the excess of the contract price over what it would have cost him to perform, but that if the stone was to be quarried previous to the taking down of the staging, the plaintiff should recover the difference between the value of the stone and the value of the plaintiff's services in getting it out. In these cases it appears that the decision turned upon the interpretation of the contract. No allowance was made for mere *preparations* to perform, because the profits of the contract were given as damages.

§ 608. Reduction of damage—Rule of avoidable consequences inapplicable.—Attempts have been made to reduce the measure of recovery by showing that the plaintiff made or might have made another contract, to be performed at the same time in which the contract in suit was to have been performed. Thus where the plaintiff sued on a contract for driving piles, the court intimated that the defendant might reduce the damages by showing that the plaintiff could have gotten other contracts, immediately upon the defendant's breach, and might have made a profit from them.^(b)

(*) 48 Vt. 116.

(b) Cincinnati, I., St. L. & C. Ry. Co. v. Lutes, 112 Ind. 276.

But the better opinion is, as we have already seen,^(*) that no such reduction should be allowed. In the first place, it seldom appears that both contracts might not have been entered into and a profit made upon both by the plaintiff. In the second place, the defendant has no claim, legal or equitable, to have the benefit of the second contract. The seeming analogy of contracts of service is not sound, for in such contracts the measure of damages is the loss of the wages of service, and if another employment can be obtained the defendant does not cause a loss of wages. To state it in another way, the profits of a contract of service consist in the difference between the wages that can be earned under the contract and the wages that can be earned elsewhere, and there is no possibility of the plaintiff's obtaining double employment at the same time. In an ordinary contract the profits are measured by the difference between the price to be obtained for the plaintiff's performance under the contract and the cost at which the plaintiff can perform. Accordingly where the plaintiff agreed to barb the defendant's wire at a certain price the defendant cannot reduce the damages by showing that the plaintiff might have procured other contracts for barbing wire.^(b) So when the plaintiff contracted to clear the defendant's field of stumps for a certain sum in gross, it was held that the defendant could not reduce the damages by showing the amount the plaintiff earned elsewhere;^(c) and where the defendant refused the plaintiff possession of a farm he had agreed to lease, damages could not be reduced by showing that the plaintiff had engaged in hauling at a profit.^(d) Where the plaintiff agreed to manufacture steel

(*) See chapter on Avoidable Consequences.

(b) *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 325.

(c) *Nilson v. Morse*, 52 Wis. 240.

(d) *Wolfe v. Studebaker*, 65 Pa. 459.

rails for the defendant at a certain price, and the defendant refused to receive them, the trial court allowed profits made from the sale to another party of rails made from the steel procured to fill the defendant's order, to be subtracted from the profits of the contract with the defendant; but the Supreme Court of the United States,^(*) while saying that the rule adopted was correct, evidently had not the point now under discussion before them, and only meant to refer to the general rules as to contracts. The point has been expressly held in *Wisconsin*.^(b) Where, however, the defendant broke his contract to supply a certain amount of advertising to the plaintiff, but the plaintiff filled all the space reserved for the defendant with equally profitable advertising matter, it was held that this fact could be shown in reduction of damages.^(c)

§ 609. *General principles of recovery.*—In every case of breach of contract the plaintiff's loss is measured by the benefit to him of having the contract performed; and this is therefore the measure of his damages. In estimating the amount of this gain, it is evident that the amount or value of the *consideration* is not to be regarded. That is merely given by the plaintiff to secure the benefits of the contract. If the contract had been performed, the plaintiff would not have had the consideration. It does not, therefore, enter into the compensation to be recovered. The chief item in the compensation is the value of the property to be delivered or the services to be rendered under the contract. This is what the plaintiff would have had if the contract had been

(*) *Hinckley v. Pittsburgh B. S. Co.*, 121 U. S. 264.

(b) *Cameron v. White*, 74 Wis. 425.

(c) *Savage v. Medical and Surgical Association*, 59 Mich. 400. The court said that no action would lie; but the plaintiff was clearly entitled, at the least, to nominal damages.

performed. Since, however, the plaintiff must have been at expense (of money or money's worth) himself in order to obtain the benefits of the contract, the net benefit by the performance of the contract would have been so much less, and that amount must be subtracted from the value of the property or services secured by the contract. The net gain, after this subtraction is made, which is often called the profits of the contract, is the measure of damages in actions of this sort. An apparent exception to the general rule occurs in the case of contracts for the sale of chattels, where in some jurisdictions the plaintiff, upon tender, is allowed to recover the whole contract price. Since, however, the tender must be kept good, and the judgment passes the title in the property from the plaintiff to the defendant, the former is still getting at last only the profits of his contract, and the exception only confirms the rule.

§ 610. **Amount of the consideration not recoverable.**—The amount of the consideration is not the measure of recovery.^(*) * So, where the plaintiff had forborne a debt, in consideration that the defendant would build a house and give a lease of it, the value of the lease was the standard.¹ "If," said Parke, B., "the consideration is to be paid in money, it must be paid; if by the delivery of a thing of ascertained value, that value is the measure of damages." So, where a wagon was transferred in consideration that the defendant would break up certain land, the value of the labor, and not of the wagon, was held to be the measure of damages.² So again, if the rent of mills is to

¹ *Strutt v. Farlar*, 16 M. & W. 249.

² *Ellison v. Dove*, 8 Blackf. 571.

(*) *Manuel v. Campbell*, 3 Ark. 324; *Norddeutschen F. V. G. v. Bertheau*, 79 Cal. 495; *Pierson v. Spaulding*, 61 Mich. 90; *Singleton v. Wilson*, 85 Tenn. 344.

be paid in repairs, the measure of damages is the value of the repairs agreed to be made.¹ ** On the same principle, where the plaintiff agreed to work for a man till she was 21 or married, and he agreed to leave her in his will a portion of his estate equal to that left to any of his children, it was held, in an action against his executors, that the measure of her damages was the value of the portion promised, and not the value of her services.^(a) So for breach of an agreement to take care of a hedge till it should be sufficiently grown to answer for a fence, the measure of damages was held to be the value of the labor and services thus undertaken, and not to include the additional value the hedge would acquire by its natural growth.^(b) In *Homesley v. Elias* ^(c) it appeared that the plaintiff sold yarn to the defendant to be paid for in cotton, the deliveries to be made before a certain day. Before that time the defendant refused to complete the contract. The plaintiff had then delivered more than enough yarn to pay for the cotton delivered. It was held that the plaintiff's damages were the value at the time of refusal of the cotton not delivered, less the value at the limit of time fixed for delivery of the yarn not delivered. Where one agreed with a surviving partner that he would pay the firm's debts, if the partner would apply the firm's property to his debts, it was held, in an action brought on this agreement by the surviving partner, that the measure of damages was the amount the other should have paid.^(d) The measure of damages in an action by the father to recover the earnings of his minor

¹ *Baldwin v. Lessner*, 8 Ga. 71.

^(a) *Frost v. Tarr*, 53 Ind. 390.

^(b) *Gantz v. Clark*, 31 Ia. 254.

^(c) 75 N. C. 564.

^(d) *Weddle v. Stone*, 12 Ind. 625.

son, is not what the son's labor would have been worth to the father, but what the son, had he been of age to contract, would have been entitled to from the employer.^(*) So for breach of contract to teach a slave a trade, the measure of damages was held to be the additional value he would have had from knowing the trade.^(b) This principle was lost sight of in a Missouri case.^(c) The plaintiff agreed to help cut the defendant's wheat, for which the defendant was to help cut the plaintiff's oats; the plaintiff performed his part of the contract, the defendant did not perform his part. The plaintiff sued on a *quantum meruit* for the value of his services, and also for damages for failure to help cut the oats. It was held that damages for failure to help cut the oats could not be recovered, but the value of the plaintiff's services was allowed as the measure of damages. This was an allowance of the consideration.

§ 611. *Inadequacy of consideration.*—* It is to be observed that mere inadequacy of consideration is no objection to a contract. Some consideration is requisite, but the sufficiency of the consideration cannot be inquired into. So it has been contended that a guarantor of negotiable paper receiving a trifling percentage for his guaranty, could not be held liable for the whole face of the paper; but on the same ground he was held liable;¹ and the rule has been repeatedly declared, that the value of the services or the amount of the consideration is of no importance, where a stipulated sum is agreed to be paid for the performance of a specific service.² It is only where fraud,

¹ *Oakley v. Boorman*, 21 Wend. 588.

² *Hamilton College v. Stewart*, 1 N. Y. 581.

(*) *Weeks v. Holmes*, 12 Cush. 215.

(b) *Bell v. Walker*, 5 Jones L. 43.

(c) *Otis v. Koontz*, 70 Mo. 183.

mistake, illegality, or oppression intervenes, that the consideration can, in this respect, be inquired into.**

§ 612. Unconscionable agreements.—* There is a class of decisions which may at first sight appear to be opposed to the general rule, that the contract furnishes the measure of damages. In an early case, brought on an assumpsit to pay for a horse a barley-corn a nail, doubling it every nail, with an averment that there were thirty-two nails in the shoes of the horse, which, being so doubled every nail, came to five hundred quarters of barley, the judge who tried the cause directed the jury to disregard the contract, and to give the value of the horse in damages, which was £8, and so they did.¹ The principle of this decision is, that if the agreement be unconscionable, the court will render such damages as may appear reasonable, without being bound by the terms of the contract. So in Massachusetts, where a note had been given to stay execution, payable in oats at 20 cents per bushel, when in fact they were worth 37 cents, it was held that the jury might disregard the contract on the

¹ James v. Morgan, 1 Levintz 111. In another case, a somewhat similar contract came up on demurrer. The plaintiff declared, on agreement, that the defendant, in consideration of 2s. 6d. in hand paid, and of £4 17s. 6d. to be paid on performance, agreed to deliver two grains of rye corn on Monday, the 29th of March, and four grains on the next Monday, and so doubling *quolibet alio die Lune* for one year. The defendant demurred, saying, "that the agreement appeared, upon the face of it, to be impossible, the rye to be delivered amounting to such a quantity as all the rye in the world was not so much; and being impossible, was void, and the defendant not bound to perform it." But after argument the court thought otherwise, Powell, J., saying: "That though the contract was a foolish one, it would hold in law, and the defendant ought to pay something for his

folly"; whereupon the reporter adds: "The counsel for the defendant perceiving the opinion of the court to be against his client, offered the plaintiff his half crown and his costs, which was accepted of, and so no judgment given in the case."

A question arose on the meaning of the contract—the defendant insisting that *quolibet alio die Lune* meant every Monday, but Lord Holt said it must be construed "*every other Monday*." This made a material difference in the possibility of executing the contract; for if the quantity were doubled thirty times, it would have reached 125 quarters; if fifty-two, it would have amounted to 524,288,000 quarters. Thornborow v. Whitacre, 2 Lord Raym. 1164.

And the principle of James v. Morgan was approved of by Lord Chancellor Hardwicke, in Earl of Chesterfield v. Jansen, 1 Wils. 286, 295.

ground that it was unconscionable, and fix the value of the oats at 20 cents.¹ So on an action brought on a promise of £1,000 if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, that the jury might mitigate the damages.^{1**} In a recent case in Massachusetts, the earlier cases cited above are overruled, and the right of a court of law to modify an unconscionable contract has been denied.^(*) The assertion of the right to sever the contract, to declare a part of it unconscionable and oppressive, and to decree performance of the remainder, is the exercise of an equitable power of a high order, the incautious exercise of which might lead to very dangerous results. These cases might more properly be brought within the rule governing cases of fraud and oppression. If the contract is on its face so extortionate and unjust as to bear evident marks of deceit, then, instead of wasting time in trying to reduce the relief to the standard of strict justice, the whole agreement should be pronounced void. Under the modern system of pleading and the fusion of the two systems of Law and Equity, either party is usually able, in cases of unconscionable agreements, to obtain such equitable relief as he may be entitled to, either in the way of reforming or avoiding the contract.

§ 613. General rule includes profits.—On breach of contract, the plaintiff, as has been seen, recovers the benefit of

¹ *Cutler v. How*, 8 Mass. 257; *Cutler v. Johnson*, 8 Mass. 266; *Baxter v. Wales*, 12 Mass. 365; *Leland v. Stone*, 10 Mass. 459. And Lord Mansfield used analogous language in regard to the action for money had and received. "Shall a man," said his lordship, "in an action for money had and received,

which is an equitable action, and founded in conscience, recover such an unmeasurable and exorbitant demand? Most clearly he shall not." *Jestons v. Brooke*, 2 Cowp. 793; and *Floyer v. Edwards*, 1 Cowp. 112.

¹ *Bacon Abr. Damages, D.*

(*) *Lamprey v. Mason*, 148 Mass. 231.

the contract, so called ; that is, the value of the property or services secured to the plaintiff by the contract, less the expense he would have been at in obtaining the benefit.* This is generally in the nature of *direct profits*, to the recovery of which, as we have seen, subject to the rule that they must be certain, no objection exists.

§ 614. *Masterton v. The Mayor.*—The leading case upon this subject is *Masterton v. Mayor of Brooklyn*.¹

* In an action of covenant brought against the authorities of the city of Brooklyn, it appeared that in January,

¹ 7 Hill 61.

(*) Philadelphia, W. & B. R.R. Co. *v.* Howard, 13 How. 307; United States *v.* Speed, 8 Wall. 77; United States *v.* Smith, 94 U. S. 214; Hinckley *v.* Pittsburgh B. S. Co., 121 U. S. 264; Cook *v.* Hamilton County, 6 McLean, 612; Greenwell *v.* Ross, 34 Fed. Rep. 656; George *v.* Cahawba & M. R.R. Co., 8 Ala. 234; Lecroy *v.* Wiggins, 31 Ala. 13; Mason *v.* Alabama Iron Co., 73 Ala. 270; Cunningham *v.* Dorsey, 6 Cal. 19; Coffee *v.* Meiggs, 9 Cal. 363; Hale *v.* Trout, 35 Cal. 229; Atlanta & L. G. R.R. Co. *v.* Hodnett, 29 Ga. 461; Willingham *v.* Hooven, 74 Ga. 233; Brigham *v.* Hawley, 17 Ill. 38; McClelland *v.* Snider, 18 Ill. 58; Springdale C. A. *v.* Smith, 24 Ill. 480; Evans *v.* Chicago & R. I. R.R. Co., 26 Ill. 189; Chicago *v.* Sexton, 115 Ill. 230; Herbert *v.* Stanford, 12 Ind. 503; Fairfield *v.* Jeffreys, 68 Ind. 578; Cincinnati, I., St. L. & C. Ry. Co. *v.* Lutes, 112 Ind. 276; Richmond *v.* Dubuque & S. C. R.R. Co., 40 Ia. 264; Thompson *v.* Jackson, 14 B. Mon. 114; Elizabethtown & P. R.R. Co. *v.* Pottinger, 10 Bush 185; Eckenrode *v.* Chemical Co., 55 Md. 51; Fox *v.* Harding, 7 Cush. 516; Somers *v.* Wright, 115 Mass. 292; Jewett *v.* Brooks, 134 Mass. 505; Burrell *v.* New York & S. S. S. Co., 14 Mich. 34; Loud *v.* Campbell, 26 Mich. 239; Grand Rapids & B. C. R.R. Co. *v.* Van Dusen, 29 Mich. 431; Goodrich *v.* Hubbard, 51 Mich. 62; Leonard *v.* Beaudry, 68 Mich. 312; Morrison *v.* Lovejoy, 6 Minn. 319; Ennis *v.* Buckeye Pub. Co., 46 N. W. Rep. 314 (Minn.); Crescent Mfg. Co. *v.* Nelson Mfg. Co., 100 Mo. 325; Hale *v.* Hess, 46 N. W. Rep. 261 (Neb.); Boyd *v.* Meighan, 48 N. J. L. 404; Cramer *v.* Metz, 57 N. Y. 659; Cahen *v.* Platt, 69 N. Y. 348; Reed *v.* McConnell, 101 N. Y. 270; Hoy *v.* Gronoble, 34 Pa. 9; Addams *v.* Tutton, 39 Pa. 447; Imperial C. & C. Co. *v.* Port Royal C. & C. Co., 20 Atl. Rep. 937 (Pa.); Collyer *v.* Moulton, 9 R. I. 90; Singleton *v.* Wilson, 85 Tenn. 344; Porter *v.* Burkett, 65 Tex. 383; Curtis *v.* Smith, 48 Vt. 116; Morey *v.* King, 49 Vt. 304; Kendall B. N. Co. *v.* Commissioners of Sinking Fund, 79 Va. 563; Nash *v.* Hoxie, 59 Wis. 384; Cameron *v.* White, 74 Wis. 425; Muenchow *v.* Roberts, 46 N. W. Rep. 802 (Wis.).

1836, an agreement was entered into between the defendants and the plaintiffs, by which the latter agreed to furnish and deliver marble to build a City Hall in Brooklyn from Kain & Morgan's quarry, in Eastchester. The defendants were to pay \$271,600 in different sums, as the work proceeded. In March, 1836, the plaintiffs entered into a covenant with Kain & Morgan by which the latter were to furnish the marble in question, for which the plaintiffs were to pay them \$112,395 at the same time that the plaintiffs were to receive their payments from the defendants, and in the proportion which the above principal sums bore to each other. The plaintiffs proved the delivery of the marble under their contract with the defendants till July, 1837, when the latter refused to receive any more marble, although the plaintiffs were ready to proceed. The entire quantity of marble necessary to fulfil the plaintiff's contract was 88,819 feet. At the time the work was suspended, the plaintiffs had delivered 14,779 feet, for which the contract price was paid. The plaintiffs then had on hand at Kain & Morgan's quarry, about 3,308 feet, ready for delivery: but this was not of much value for other buildings, and would probably not bring over two shillings per foot. It was proved that had the work progressed with ordinary diligence, it would have taken the plaintiffs about five years to complete their contract; and they then proved that the difference between the cost of the marble to them, and the price to be paid for it in 1836, was about 20 per cent.; and that it fluctuated between that rate and 40 per cent. during the four successive years to 1840. That the ordinary profit calculated on by master stone-cutters was from 10 to 20 per cent., and that 15 per cent. was a fair living profit. All this evidence as to profits was objected to, but admitted by the circuit judge (Kent), under exceptions. The

defendants requested the circuit judge to instruct the jury "that no damages should be allowed on account of any supposed profits which the plaintiffs might have made out of the unfinished work, and that the damages allowed should be confined to the actual loss which the plaintiffs had sustained." This the circuit judge refused to do, and he charged—

"That the jury should allow the plaintiffs as much as the performance of the contract would have benefited them; that the plaintiffs were entitled to recover for the unfinished marble not accepted, subject to a deduction of what should be deemed its fair market value; that the jury should confine the damages to the loss of the plaintiffs, but that the benefit or profits which they would have received from the actual performance constituted such loss. That the defendants ought to be allowed what the jury should think just as to interest on the outlays of the plaintiffs, also what the jury might think just for the risk of transportation, and the reasonable value of the marble unaccepted and unquarried. As to damages on the rough marble, to be delivered by Kain & Morgan, it appears by the contract that the plaintiffs were obliged to purchase it from this quarry. The plaintiffs' contract with Kain & Morgan, if made in good faith, was entered into as a reasonable part of the performance by the plaintiffs of their own contract; if the defendants by stopping the work obliged the plaintiffs to break their contract with Kain & Morgan, then the damages on the latter ought to be allowed to the plaintiffs, who would be responsible to Kain & Morgan for the same. The jury are to give the difference between the contract price and what it would cost Kain & Morgan to deliver the article, deducting the value of it to them, and making all proper allowances, as in the case of the principal contract. In fixing the damages to be allowed the plaintiffs, the jury are to take things as they were at the time the work was suspended, and not allow for any increased benefits they would have received from the subsequent fall of wages or subsequent circumstances."

The jury found a verdict in favor of the plaintiffs for \$72,999. The defendants moved for a new trial; and

Nelson, C. J., delivering the opinion of the court, after noticing that the damages for marble on hand, ready to be delivered, were not made a matter of discussion on the argument—as to the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837, and as to the claim for profits—said :

“ It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damages. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. . . . When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract.

“ But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself—entering into and constituting a portion of its very elements—something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.”¹ “ If there was a market value of the article in this

¹ See this language cited with approbation in *Lawrence v. Wardwell*, 6 Barb, 423.

case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery, and the court and jury should see that, in estimating this amount, it be made upon a substantial basis, and not left to rest on the loose and speculative opinions of witnesses."

And the learned chief justice fortified this allowance of profits by reference to the civil law and the analogies derived from the cases in our own law, which we shall hereafter have occasion to consider, where upon non-performance of contracts for the sale and delivery of chattels, the market price, which, of course, includes profits, is made the measure of compensation.**

§ 615. **Contracts to expend labor on property.**—In a very large class of contracts, such as provide for manufacture, construction, repairs, and transportation, the benefit to be derived from performance is the addition of value to property through the expenditure of labor. The consideration on the other side may, or may not, be pecuniary. The plaintiff in these cases recovers, as his measure of damages, the difference between the value of the property, as left by the defendant, and the value it would have had if the labor had been expended. There are cases where the plaintiff would be held obliged to reduce this loss if on breach he might have procured the performance of the contract by some other person and neglected to do so; but this subject is fully treated elsewhere.^(*) The difference in value may be got at in different ways, as has been well explained by the New York Court of Appeals in a recent case, which follows and explains *Masterton v. The Mayor*.

§ 616. **Kidd v. McCormick.**—This was an action brought by plaintiff to reach a trust fund deposited with the

(*) See chapter on Avoidable Consequences.

Union Trust Co. of New York.^(*) Plaintiff entered into a contract with defendants, T. and J. McCormick, by which it was agreed that plaintiff should sell seven lots of land to defendant J. McCormick, who should give back his bond and mortgage thereon for the purchase-money. The McCormicks further agreed to erect a dwelling upon each lot to be completed on July 1, 1877, plaintiff making to them certain advances to aid in their erection, and to be repaid to him when the houses had reached a certain stage of completion.

After the land had been conveyed, and the erection of the buildings commenced, the vendees procured a loan from defendants, C. B. & G. H. Granniss, secured by mortgages on four of the lots, and an agreement was made between all parties that a certain portion of the moneys loaned by said Grannisses should be deposited in a trust company as collateral security for the completion of the dwelling-houses, and that said mortgages should have priority of plaintiff's mortgages on said lots. The vendees proceeded with the work till September 1, 1877, when they abandoned the houses in an unfinished condition and declined to complete them. Whereupon the plaintiffs went on and finished the buildings. The question was, what was the measure of plaintiff's damages?

Folger, J., said that the plaintiff's damages were the difference in the value of the premises, as they were with the houses unfinished, at the date of their abandonment, from what the value of them would have been had the houses been finished on that day according to the contract.^(b) He continued:

"I am aware that there has not been harmony in the expressions of learned judges in passing upon the question of the meas-

^(*) 83 N. Y. 391, 397.

^(b) *Acc. Morton v. Harrison*, 52 N. Y. Super. Ct. 305.

ure of damages. I apprehend, however, that it has been principally in pointing out the kind of testimony by which the amount of damages was to be got at rather than in the rule that was to govern. Stated in its broadest form the plaintiff is to have that compensation which will leave him as well off as he would have been had the contract been fully performed. With more particularity he has a right to a house as good as that which the defendants agreed to furnish ; and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known, is that of experts saying what would have been the value of one and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is when the house has been, in fact, finished up to that mark, what it did in fact cost to finish it. But these ways all lead to the same end ; what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last named kind of testimony ; *first*, that the plaintiff is not under obligation to go on and finish the house ; *second*, that he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, when there will come into the damages the element, spoken of by Marvin, J.,^(*) of loss from delays ; and *third*, that the cost of actual building may have increased after the day of performance, and so be a detrimental gauge of damage for the defaulting contractor. Yet the referee received testimony in each of these ways, and therefrom reached a result, by the application to the facts thus before him of the rule we have above stated. We think that he made no error."

§ 617. *Distinction between damages and means of proving them.*—This clear explanation of the matter, and the distinction it points out between the methods of proof and the measure of damages, is important. Nevertheless, the courts have not always been precise in the language which they have employed, and besides this it often happens that only one of these methods of getting

(*) In *Morrell v. Irving F. I. Co.*, 33 N. Y. 429.

at the elements of damage is resorted to when it will make no practical difference whether we say that the damage is the difference in value with and without the labor, or the cost of completion. Strictly speaking, however, the cost of completion is always a matter of evidence.

Thus where the defendant agreed to tow the plaintiff's coal from Pittsburg to Oil City, and failed to do so, and it was impossible to secure other means of transportation, the plaintiff was allowed the difference in the value of the coal at Pittsburg and at Oil City.^(*) The plaintiff loaned money on a mortgage of certain uncompleted houses, which the defendant covenanted should be built in a certain manner; they were not so completed. The houses were sold on foreclosure, and it became impossible, therefore, to complete them. The measure of damages was held to be the difference in value of the houses as completed and as they should have been completed, at the time the plaintiff had notice of their deficient construction; not exceeding, however, the mortgage debt and interest at that time.^(b) And where the work of repairing a house was not done according to the contract, but the work having been completed, it would be impossible to have the errors rectified except at enormous expense, the cost of such rectification was not allowed to be shown as evidence of the difference in value between the house as it was and as it should have been.^(c) Where upon the defendant's failure to perform the work the plaintiff brings suit without having the work done by another, the measure of damages has been said to be the cost of procuring the work done elsewhere.^(d)

(*) *McGovern v. Lewis*, 56 Pa. 231.

(b) *Norway Plains Bank v. Moors*, 134 Mass. 129.

(c) *Morton v. Harrison*, 52 N. Y. Super. Ct. 305.

(d) *Sillivant v. Reardon*, 5 Ark. 140; *Carli v. Seymour*, 26 Minn. 276.

Generally, upon the defendant's failure to perform the work the plaintiff may recover the expense of having it done elsewhere, or if the consideration has not been paid in advance the difference between such expense and the contract price. This has been held in contracts to manufacture or construct,^(a) to repair,^(b) and to transport.^(c) In all these cases the plaintiff is held to the rule of avoidable consequences. He cannot increase his damages, by unreasonably neglecting (in a proper case) to have the work done elsewhere. That is, he is entitled in any case to the difference in value; he cannot increase this by the neglect of reasonable precautions; but on the other hand he is not under any obligation to take the burden off the defendant's shoulders, by executing the contract himself on better terms than the contract calls for.

§ 618. *Damages upon prevention of performance or rescission by defendant.*—Where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work, and what it would have cost the plaintiff to complete it.^(d) Differently stated, the rule in such a case

(^a) *Broumel v. Rayner*, 68 Md. 47; *Florence M. Co. v. Daggett*, 135 Mass. 582; *Hirt v. Hahn*, 61 Mo. 496.

(^b) *Howe M. Co. v. Reber*, 66 Ind. 498; *Orr W. Co. v. Reno W. Co.*, 19 Nev. 60; *New York v. Second Ave. R.R. Co.*, 102 N. Y. 572.

(^c) *Fletcher v. Gillespie*, 3 Bing. 635; *Lamoreaux v. Rolfe*, 36 N. H. 33 (*semble*).

(^d) *Myers v. York & C. R.R. Co.*, 2 Curt. C. C. 28; *Upstone v. Weir*, 54 Cal. 124; *Cox v. McLaughlin*, 54 Cal. 605; *Morgan v. Heffer*, 68 Me. 131; *Grand Rapids & B. C. R.R. Co. v. Van Dusen*, 29 Mich. 431; *Glaspie v. Glassow*, 28 Minn. 158; *Pevey v. S. & B. L. Co.*, 33 Minn. 45; *Ennis v. Buckeye Pub. Co.*, 46 N. W. Rep. 314 (Minn.); *Park v. Kitchen*, 1 Mo. App. 357; *Hale v. Hess*, 46 N. W. Rep. 261 (Neb.); *Durkee v. Mott*, 8 Barb. 423; *Danley v. Williams*, 16 Wis. 581.

is recompense to the plaintiff for the part performance, and indemnity for his loss in respect to the part unexecuted.^(*) The plaintiff is to be placed in the same condition he would have been in if he had been allowed to proceed without interference.^(b)

A city, repudiating a contract with the defendant to do street cleaning, is liable for the difference between the value of the work to be done and the contract price.^(c) The true measure is the value of the plaintiff's labor, and the profits he could have fairly derived from the labor he was prevented from performing.^(d) In an action of assumpsit to recover for machines partly constructed under a contract between the plaintiff and defendant, but left unfinished, owing to the defendant's neglect to furnish necessary castings, and therefore not delivered, the measure of damages was not the value of the labor and material on these machines, but the plaintiff's damages for being prevented from completing them and receiving the agreed price—taking into account whatever the unfinished machines left on his hands were worth to him.^(e) If, in such a case, the plaintiff is put to the same expense in time and money as if he had fully performed, the contract price of the whole work is the measure of damages.^(f) But in the ordinary case the plaintiff cannot by showing readiness to perform or a tender of performance, recover the contract price.^(g)

(*) *Upstone v. Weir*, 54 Cal. 124; *Friedlander v. Pugh*, 43 Miss. 111; *Polsley v. Anderson*, 7 W. Va. 202.

(b) *United States v. Smith*, 94 U. S. 214; *Elizabethtown & P. R.R. Co. v. Pottinger*, 10 Bush 185.

(c) *Devlin v. Mayor of New York*, 63 N. Y. 8.

(d) *Cunningham v. Dorsey*, 6 Cal. 19.

(e) *Allen v. Thrall*, 36 Vt. 711.

(f) *Wood v. Schettler*, 23 Wis. 501.

(g) *Lindley v. Dempsey*, 45 Ind. 246; *Hosmer v. Wilson*, 7 Mich. 294.

* So, in Kentucky it has been held, that a plaintiff contracting to do work for a stipulated price, and who is ready to perform his agreement, but is prevented by the other party, cannot recover the price named in the contract for the whole work, but only the actual damages sustained by him. And as "the amount of compensation which the plaintiffs had recovered exceeded the value of the work they had done, and as, moreover, they did not attempt to prove any special loss or damage, they were not entitled to recover anything."¹** So where the plaintiff was employed by the defendant to do certain work; after he began to do it, the order was countermanded by the defendant; but the plaintiff went on to complete the job, and insisted that he was entitled to recover for doing the whole and for the materials furnished, and so the Common Pleas held. But, on error, the judgment was reversed; the court saying that "in all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith toward his employer."³ The same rule applies where the consideration is paid by an employer in advance. The mechanic is not entitled in such case to retain the full price, even if the work is stopped by the default of his employer, but so much only as will compensate his actual damage.^(*) In an action for such a breach of contract, evidence by the defendant to show that the fulfilment of the contract would have cost the plaintiff more than he was to receive

¹ *Chamberlin v. McCallister*, 6 Dana 352. See, also, *Caldwell v. Reed*, Little Sel. Cas. 366. ³ *Clark v. Marsiglia*, 1 Denio 317; and see *Durkee v. Mott*, 8 Barb. 423.

(*) *Hood v. Raines*, 19 Tex. 400.

from the defendant, is proper.^(*) Where a contractor was to build a road, but was stopped when he had partially finished, the measure of damages was held to be the difference between the contract price and what it would have cost him to finish the road, but the defendant might show that the plaintiff would have been unable to finish it according to the agreement, and the jury were to take into consideration the fact that the plaintiff was relieved from this burden.^(b) But where the defendants wilfully embarrass and delay the plaintiffs, so that the contract which would have been profitable on the original estimates, has, in consequence of such conduct, become the reverse, the original principles and mode of estimate may, at the plaintiff's election, be departed from, and he may recover under a *quantum meruit*.^(c) The recovery upon a *quantum meruit* will be considered later.^(d)

§ 619. Entire contract price recoverable in some cases.— In some cases the plaintiff may recover the whole contract price. A common case is that of a schoolmaster. If a scholar is removed from the school during the quarter the schoolmaster may recover the tuition fee for the whole quarter.^(e) So upon an agreement to pay the plaintiff a certain amount for his legal services in a pending litigation he may recover the agreed amount, though the controversy is brought to an end by compromise.^(f) Where it was agreed that the plaintiff should weigh all the grain carried over the defendant's road at a stipulated price, and the defendant allowed another to weigh grain, the plain-

(*) *Durkee v. Mott*, 8 Barb. 423.

(b) *Waco T. R.R. Co. v. Shirley*, 45 Tex. 355.

(c) *Merrill v. Ithaca & O. R.R. Co.*, 16 Wend. 586.

(d) § 654.

(e) *Collins v. Price*, 5 Bing. 132; *Sprague v. Morgan*, 7 Ala. 952.

(f) *Hunt v. Test*, 8 Ala. 713; *Baldwin v. Bennett*, 4 Cal. 392.

tiff was allowed to recover at the contract price for all grain thus weighed by the other. (*)

The principle upon which these cases rest seems to be, that the whole contract price is to be given, because it is impossible to show with the required certainty any pecuniary outlay which the plaintiff has been saved by the breach. The school must continue in session, with its entire corps of instructors, although a scholar is withdrawn; the office of a weigher of grain must still be kept open, and at the same expense, though part of the anticipated custom fails. It would seem necessary, then, that in order to have the cost of performance subtracted from the contract price the defendant must in a case of doubt be prepared to show affirmatively that the performance would have cost the plaintiff something which he has been saved by the breach, and to prove the amount definitely.

§ 620. *Tender of performance.*—* On a contract to transport horses in a canal-boat for a given sum of money, the plaintiffs averred a readiness and offer to perform on their part, and a neglect and refusal on the part of the defendants to furnish the freight, and claimed to recover the entire sum specified in the agreement. But the Supreme Court of New York held that they were only entitled to recover what they had actually lost by the defendants' non-performance, saying: "Suppose the plaintiffs had the next hour been furnished with freight entirely adequate to the voyage at the same sum, they then would have been entitled to the damage arising from detention for that time, but no more. A tender and offer to perform is equivalent to performance, but merely for the purpose of sustaining an action; it is not performance, though in one respect it resembles it

(*) *Lake Shore & M. S. Ry. Co. v. Richards*, 126 Ill. 448.
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consequentially. It is *quasi performance*, but it does not regulate the amount of damages."¹ **

§ 621. *Waiver of full performance.*—A waiver of full performance, made by the defendant, stands on a different footing from a tender of performance by the plaintiff. It is really the waiver of a condition, and the undertaking of the defendant thereupon becomes unconditional. If the undertaking is not then performed, the plaintiff's loss is the whole benefit which was to come to him by the contract. So where there is an acceptance of partial performance in lieu of complete performance of an entire contract by one party to it, the other being ready to complete it on his part, compensation may be recovered for the whole benefit secured to the plaintiff by the contract.^(*)

Rule of Damages in Particular Cases.

§ 622. *Agreements to loan money.*—Having now stated the general rules applicable in actions of contract, we proceed to give some instances of their application in special classes of cases; and first, an agreement to loan money.

Upon breach of a contract to loan money special damages may in a proper case be recovered; but if no special damage is shown, the recovery is only nominal.^(b) For though by the contract the plaintiff would receive the amount of the loan, it would be saddled with an obligation of exactly equal amount, so that the profit of the contract would be nothing. It is clear, however, that a contract to loan money at less than the current rate of interest would give the right to substantial damages.

¹ *Shannon v. Comstock*, 21 Wend. 457, 460.

(*) *Ellis v. Willard*, 9 N. Y. 529; *Ashcraft v. Allen*, 4 Ired. L. 96.

(b) *Turpie v. Lowe*, 114 Ind. 37.

§ 623. **To assign or keep valid an insurance policy.**—Where the defendant sold the plaintiff a house, and agreed to assign the policy of insurance upon it, the measure of damages upon a breach of the agreement is the cost of insurance for the unexpired term of the policy ; in other words, the value of the policy. If the house is burned without insurance, the plaintiff can recover nothing for loss of the insurance money,^(a) for he should have insured himself. The defendant assigned a policy of insurance for £1,000, on which he was to pay the premiums, to trustees for his creditors by a deed containing a covenant that he would do nothing to avoid the policy, which was subject to a condition that if the assured should go beyond the limits of Europe, it should be void. He violated this covenant, thereby avoiding the policy. It was held that the measure of damages was the value of the policy at the time of the judgment, taking into consideration the fact that the defendant had covenanted to pay and should pay the premiums thereon.^(b)

§ 624. **To work a farm on shares.**—In an action for breach of a contract by which the defendant agrees to cultivate a farm on shares, the measure of damages is the profit which the plaintiff would have made if the contract had been fulfilled.^(c) Where such an agreement was broken by the owner of the farm, the fact that the plaintiff got another farm to work was held immaterial.^(d)

§ 625. **For construction of buildings, etc.**—Where upon a contract to construct, the defendant delayed the construction, the plaintiff, who was the contractor, was al-

(a) *Dodd v. Jones*, 137 Mass. 322.

(b) *Hawkins v. Coulthurst*, 5 B. & S. 343.

(c) *McClure v. Thorpe*, 68 Mich. 33 ; *Hoy v. Grenoble*, 34 Pa. 9.

(d) *Taylor v. Bradley*, 4 Abb. App. 363.

lowed to recover the increased cost of construction caused thereby. (*) Mitchell, J., said :

“Where a contractor in good faith enters upon the performance of a contract, and incurs expense, the employer having notice of that fact, if the employer, either by an order or by negligently failing to perform an essential part to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work it will be implied that all loss, necessarily occasioned by such suspension, of which the employer is at the time notified, shall fall upon him. The contractor may not acquiesce in the suspension in silence, and upon the resumption and completion of the work claim the contract price, and damages for that which may have occurred with his acquiescence. If, however, notice be given of his readiness and willingness to prosecute the work to completion within the time agreed upon, and that its suspension will involve him in loss, we can discover no principle upon which it can be held that the loss must fall upon the contractor in case of a voluntary resumption of the contract. . . . The plaintiff may recover as damages any direct loss which he sustained by the unreasonable suspension or delay of the work by the employer. The employer must have had notice that the suspension would result in loss, and the suspension must not have been consented to by the contractor.”

In this case the contractor recovered compensation for injury to tools, and interest for the period of delay upon all moneys invested upon materials furnished for the work, and labor necessary in furnishing them. So where the plaintiff and defendant entered into a written contract, by which the former agreed for a certain sum to be paid him by the latter to do the carpenter's work on a school-house to be built, and furnish and use the necessary materials, and that he would “commence said work and proceed therewith without delay, and in such a manner as not to delay the contractor for the mason work,” it was held that this covenant implied

(*) Louisville & N. R.R. Co. v. Hollerbach, 105 Ind. 137, 145, 151.

a correlative obligation on the part of the defendant to have his building in readiness for the plaintiff to perform the condition ; and that the plaintiff, having sustained damages from the defendant's delay in having the building ready for him to do the work, could maintain an action to recover the amount of his damages, in which was included his increased expense from the delay.^(*)

* Where a millwright agreed to put machinery into the plaintiff's mill in a good and workmanlike manner, and he did it so unskilfully that the same was of little or no value, and the plaintiff lost the profit and benefit of his mill for a long space of time, and was obliged to alter the machinery, it was held that the plaintiff was entitled to recover such additional sum, beyond the expense of the repairs, as the mill would have been worth to him if the defendant had fulfilled his contract, more than it was worth while the machinery was insufficient, and that the opinions of witnesses might be received. In this case the court apparently meant to give the profits of working the mill.¹ ** In *Railroad Co. v. Smith*,^(b) the plaintiff was allowed to recover for the delay of trains and for extra men to work a defectively built bridge. Where a contractor does not finish a house in the time agreed, but is afterward allowed to go on with the contract, the owner recovers the value of the use of the building during the delay.^(c) *Snell v. Cottingham*^(d) was an action on an agreement by Cottingham with Snell to build the road of the L. B. & M. Co. by a certain time. The company had leased its line to the T. W. & W. Co.,

¹ *Clifford v. Richardson*, 18 Vt. 620.

(*) *Allamon v. Albany*, 43 Barb. 33.

(b) 21 Wall. 255.

(c) *Korf v. Lull*, 70 Ill. 420 ; *Ruff v. Rinaldo*, 55 N. Y. 664.

(d) 72 Ill. 161.

agreeing to have the line finished by a certain day, and to pay the interest on certain bonds. Snell assumed the obligations of the L. B. & M. Co., and agreed with the T. W. & W. Co. that if the road should be completed before the time agreed between the two companies the interest on the bonds should be saved for all the time gained. The time fixed by Cottingham's contract was earlier than that of the contract between the companies. Snell had made his agreement with Cottingham with reference to his contract with the company, but this Cottingham did not know. Cottingham did not finish the road within the time agreed. It was held that Snell could only recover the value of the use of the road during the delay, and that the other contract could not be considered, as it was not in the contemplation of the parties.

In *Phillips & Colby Construction Company v. Seymour*,^(*) the defendant failed in the payment of an instalment which was due the plaintiff for labor in the construction of the defendant's railroad. It was held, in an action for the defendant's breach of contract, that the defendant could generally recover for delays by the plaintiff in performance; yet in this particular case it was not error to have excluded this claim, for "the whole basis of this calculation is conjectural, uncertain, and vague. There is nothing on which a jury could have done anything but conjecture and speculate, at the hazard of sacrificing truth and justice." * In regard to contractors for works, another question sometimes presents itself, of great importance to the amount of recovery; and it is settled that where the parties agree that the estimate of any third party shall be conclusive on the question of remuneration, the courts will so treat it. If, indeed,

(*) 91 U. S. 646. See this case as to the items recoverable in such actions.

by fraud or collusion, the arbitrator selected refuses to make an estimate, then the plaintiff may resort to other testimony. But he cannot do this so long as the defendant observes and insists on the contract.^{1**}

§ 626. **For forbearance.**—* Contracts for forbearance are often entered into by creditors for certain considerations, on which they forbear to pursue their debtor during a given time. In a case of this kind, where the plaintiff had recovered judgment against his debtor, the defendant, in consideration that the plaintiff would forbear to sue out execution for a certain time, agreed to erect a house and lease it to the plaintiff; such erection and lease to be in full satisfaction of the judgment. The agreement not being performed, it was held that the value of the house was the measure of damages, and not the difference between the amount of the judgment and value of the house.^{1**} For breach of a contract to forbear, it is held in Indiana that the measure of damages is limited by the amount forborne, with interest and costs to the sale. Damages sustained by a forced sale of the property levied on are too remote.^(*) Where the defendant had the plaintiff arrested, the latter may also recover the expense of obtaining a discharge.^(b)

§ 627. **Actions against stockholders.**—* The measure of damages in actions brought by incorporated companies against stockholders, upon calls made for payment of stock, furnishes us with another subject of inquiry. Where the defendant subscribed for stock which had been forfeited by the company, it has been held in New

¹ *Hotham v. East India Co.*, 1 T. R. 79; *Randel v. Chesapeake and D. Canal Co.*, 1 Harr. 233.
638; *Canal Trustees v. Lynch*, 10 Ill. Co., 1 Harr. 233.
521; *Merrill v. Gore*, 29 Me. 346; ² *Strutt v. Farlar*, 16 M. & W. 249.
Easton v. Penn. & O. C. Co., 13 Ohio See *Ellison v. Dove*, 8 Blatchf. 571.

(*) *Indiana & I. C. Ry. Co. v. Searce*, 23 Ind. 223.

(b) *Smith v. Way*, 6 All. 212.

York that the forfeiture was not a bar to the action, but that the nominal value of the stock forfeited, less the actual cash value at the time it was declared forfeited, was the measure of compensation.¹ And unless the value of the stock reaches the whole debt and interest,² the plaintiff must have judgment for the balance.^(*) ** Where, in such actions, all the money subscribed is necessary for the purpose intended, the recovery is of course measured and limited by the amount subscribed; but if an amount less than the amount subscribed is all that is in fact required, it is held, in Illinois, that the recovery should be *pro rata*.^(b) A promise to subscribe for a certain amount of stock in a plank-road company, to induce the selection of a particular route, if accepted, is valid, and may be enforced. The measure of damages is the difference between the value of the stock at the time of the trial, and the amount agreed to be paid for it.^(c) On the other hand, on a breach of an agreement to give land for stock, if a specific performance cannot be decreed, in estimating the damages, reference should be had not to the nominal value of the stock, but to the land which ought to have been conveyed.^(d)

§ 628. **By assignees of bankrupts.**—* Interesting questions are often presented in suits by assignees seeking to enforce contracts made by the bankrupt. In a case in *assumpsit* in the English Exchequer, the facts were that the bankrupt had, previous to his bankruptcy, delivered to the defendant a bill of exchange for £600, which he promised to discount, retaining £100 and the discount.

¹ *Herkimer Man. & H. Co. v. Small*, 21 Wend. 273. ² S. C. 2 Hill, 127.

(*) *Johnson v. Stear*, 15 C. B. N. S. 330.

(b) *Miller v. Ballard*, 46 Ill. 377.

(c) *Rhey v. Ebensburg & S. P. R. Co.*, 27 Pa. 261.

(d) *Dayton & C. R.R. Co. v. Hatch*, 1 Disney 84.

He kept the bill, however, and paid nothing to the bankrupt. On this state of facts, the judge who tried the cause told the jury that they were bound to give the £600, less the £100 and the discount. An effort was made to set the verdict aside, on the ground that the cause should have been left to the jury at large, and that the judge erred in telling them, as a *point of law*, that the sum above stated was the measure of damages. But the charge was held right, and the court said: "No doubt all questions of damage are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."¹ (*)**

§ 629. *Agreements for arbitration and award.*—Where the defendant broke his contract to submit a dispute to arbitrators, it was held that the plaintiff could recover substantial damages, although it was found that he had no valid claim. The damages would include "expenses to which he had been subjected by reason of his necessary preparation for a trial before the arbitrators, on account of his own loss of time and trouble, and in employing counsel, taking depositions, payments to witnesses and arbitrators," and other expenditures; but he could only recover these so far as they were not available for the trial of his cause before the court, for he had to repair to the latter, and the only result of the defendant's act was

¹ *Alder v. Keighley*, 15 M. & W. 117.

(*) The equitable assignee in this class of cases has no greater right than the plaintiffs in the record. *Griffiths v. Perry*, 1 E. & E. 680. But his right is equal to theirs: *Ashdown v. Ingamells*, 5 Ex. Div. 280.

to make him incur the extra expenses. It was said that the counsel fees were recoverable, for they were suitable and properly incurred, and the plaintiff was deprived of their benefit by the wrongful act of the defendant.^(a)

§ 630. **To construct stations, etc.**—Where a railroad company breaks an agreement to build a station at any given place, the measure of damages is the enhanced value of the land had the depot been erected.^(b) In *Missouri, K. & T. Ry. Co. v. Fort Scott* ^(c) the company broke its contracts to extend its line to Fort Scott. It was held that plaintiff could recover either the value of the improvements for purposes of taxation, or, as the contract was entire, the whole consideration paid in advance; but evidence to show a decline in population and depreciation in real estate was inadmissible as being too speculative. Where a subscription was made to the stock of a railway company on the condition that the railway should pass by a certain place, which condition the company failed to comply with, but before their failure the subscriber had paid his subscription by a transfer of land to the company: in an action by the subscriber against the company for breach of the agreement, the measure of damages was held the value of the land at the time of the transfer.^(d)

§ 631. **To build fences, walls, etc.**—For breach of an agreement to build fences and cattle-guards, the measure of damages is the cost of building them.^(e) But where

(a) *Pond v. Harris*, 113 Mass. 114.

(b) *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422; *Louisville N. A. & C. Ry. Co. v. Sumner*, 106 Ind. 55; *Watterson v. Alleghany V. R.R. Co.*, 74 Pa. 208; *Houston & T. C. Ry. Co. v. Molloy*, 64 Tex. 607. This was said, however, to be too remote in *Rockford, R. I. & St. L. R.R. Co. v. Beckemeier*, 72 Ill. 267. See § 194.

(c) 15 Kas. 435.

(d) *Jewett v. Lawrenceburgh & U. M. Ry. Co.*, 10 Ind. 539.

(e) *Logansport, C. & S. W. Ry. Co. v. Wray*, 52 Ind. 578.

a sea-wall, built by the defendant, had not been constructed according to his agreement, and he had promised the plaintiff to rebuild it, but failed to do so, and in reliance on such promise, the plaintiff himself delayed rebuilding it, the loss of the use of the wharf, during the period of delay thus caused, was held the direct and immediate consequence of the defendant's failure, for which he was liable.^(a) Where the grantee failed to build a wall on his own land, according to agreement, the grantor's measure of damages is not the cost of the wall, but the difference in value of his own adjoining land with and without the wall.^(b)

§ 632. *Not to engage in business.*—The measure of damages upon breach of a contract not to engage in business is so difficult to estimate that the damages are usually liquidated. If no damages are stipulated in the agreement the plaintiff can, of course, recover only such as he proves he has sustained by the breach.^(c) Where the defendant by breach of the contract so increased the demand for labor that the rate of wages was increased, it was held that the plaintiff might recover compensation for the increased wages he had to pay, and also for his loss by reason of workmen enticed away by the defendant.^(d)

In *Peltz v. Eichele* ^(e) the defendant had covenanted not to manufacture certain articles. It was said that what the defendant had gained might be evidence of what the plaintiff had lost, but the plaintiff must show that he has suffered the loss, as, for example, in the de-

(a) *Willey v. Fredericks*, 10 Gray 357.

(b) *Wigsell v. School*, 8 Q. B. D. 357.

(c) *Jenkins v. Temples*, 39 Ga. 655; *Burckhardt v. Burckhardt*, 36 Oh. St. 261; 42 Oh. St. 474.

(d) *Whittaker v. Welch*, 2 Pugs. 436.

(e) 62 Mo. 171.

crease of his business, the stoppage of his factory, etc. In an action against a physician for breach of an agreement not to practice, the measure of damages was held to be such sum as the jury might find to have been the value of the practice which the plaintiff lost between the time when the defendant resumed practice and the time of instituting the suit.^(*) Where a combination is formed to raise or depress the price of an article, the measure of damages for the breach of the agreement is the difference in price which would have been produced by the combination.^(b)

§ 633. For exclusive agency.—In *Smith v. Weed Sewing Machine Co.*^(c) the company had made Smith its agent, and had agreed not to sell any machines in his district. It sold several. It was held, that under a count for money had and received, Smith could not recover in addition damages for breach of the contract. The defendant, a manufacturer of organs, agreed to sell the plaintiff organs, and that the plaintiff alone should sell organs at retail within a certain territory. The plaintiff went to expense to advertise and sell organs, and sold or could at once have sold a certain number of organs, which he ordered of the defendant. The defendant refused to supply them. It was held, in the first place, that no damages could be recovered on account of profits expected from future sales; for not only the uncertainty of the trade, but also the fact that the defendants could not prevent, and evidently were not expected to prevent the entire sale of the defendant's organs, made the general profits of the agreement entirely conjectural. The plaintiff was allowed, in the second place, the general expenses

(*) *Warfield v. Booth*, 33 Md. 63.

(c) *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506.

(b) 26 Oh. St. 562.

for advertising and sale of the organs, under the principle that when the expected profits of an agreement cannot be recovered the expenses of the plaintiff in preparing to do his part may be recovered. In the third place, the plaintiff was allowed the profits on the sale of so many organs, as it was shown with reasonable certainty that he had sold or was on the point of selling.^(*)

§ 634. Assignments of judgment.—* In the case of an assignment of a judgment containing a warranty that the sum specified remained due and unpaid, when in fact no judgment had ever been entered up, the Supreme Court of New York held, in an action of covenant, that the measures of damages was not the amount recovered as stated in the assignment of the judgment, but the amount of property owned by the judgment debtor, and which might have been taken in execution intermediate the time of assignment and the commencement of the suit.¹ It is worthy of notice here, that the amount of consideration or value paid did not appear on the face of the assignment, and that it is not stated in the report whether the evidence in regard to the amount of property owned by the alleged judgment debtor came from the plaintiff or defendant; although, as the declaration is stated to have averred that the plaintiff had property enough to satisfy the demand, the pleader seems to have thought that, regularly, it should have come from the plaintiff. It would seem that, *prima facie*, either the amount appearing to have been paid for the judgment, or the amount recovered by it, should be the measure of damages. If the assignment were treated as a chattel, then

¹ Jansen v. Ball, 6 Cow. 628.

(*) Sterling O. Co. v. House, 25 W. Va. 64; *acc.* Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. Rep. 440.

the price paid would again be the rule, subject to the plaintiff's right to show that the whole amount could have been recovered, and then for its value beyond the price ; and also subject to the further right of the defendant to show that, owing to the judgment debtor's insolvency, it was worthless. If the analogy in the case of sheriffs were adopted, then the amount recovered by the judgment would be the *prima facie* measure, subject to the defendant's right to reduce the sum by showing that, owing to the judgment debtor's circumstances, its whole amount could not be collected.** It is well settled that the measure of damages is not the consideration. So where, in assigning a judgment, the defendants covenanted that there was then due a certain sum, and that they would not discharge the judgment, and it appeared that they had previously discharged one judgment debtor, it was held that the plaintiffs could recover the difference between the present value and the value it would have had if that debtor had not been discharged. In this case the price paid was only ten per cent. of the judgment.(*) Where one of three judgment debtors had been released, it was held, in an action by the assignee of the judgments against the assignor for breach of covenant, that, neither of the others having been released, in the absence of proof that the judgment was wholly valueless, the assignee could not, while retaining it, recover as if there had been a total failure of consideration. He would be entitled in such a case to the expenses of attempting to enforce the judgment against the released debtor.(b)

§ 635. **Alternative contracts.**—Contracts are sometimes in the alternative, that is, the promisee agrees to perform

(*) *Bennett v. Buchan*, 61 N. Y. 222.

(b) *Weston v. Chamberlain*, 56 Barb. 415.

one of two things; for instance, to deliver an article or to pay a sum of money. This usually gives him his election, and the damages are measured by the rule most beneficial to him. The whole subject of alternative contracts is fully discussed in an earlier chapter.^(*) It is important, however, to notice that a contract which was originally in the alternative may have ceased to be so, through the exercise of the option by one party or the other. As soon as the option is exercised, and one alternative chosen, the other falls entirely out of the case; and, if the contract is thereafter broken, the damages are to be determined as upon an ordinary contract to do what has been chosen by the party exercising the option.

§ 636. *Miscellaneous contracts.*—The defendant agreed to furnish to the plaintiff, the publisher of a country newspaper, “patent outsides,” containing no more than three columns of advertisements. The “outsides” furnished did, in fact, contain more than three columns, and the plaintiff claimed compensation for the excess at his own advertising rates. It was held, however, that the measure of damages was the difference between the value of “outsides” with three columns of advertising and the value of those furnished.^(b) The defendant agreed to publish a book written by the plaintiff, an unknown author. Upon breach, it was held that, notwithstanding the difficulty of ascertaining the amount of loss, compensation must be given for the plaintiff’s loss in not having his book published.^(c) It would seem that the court should have allowed the cost of securing another publisher. This would be the same as the difference between the value of the book in manuscript and after

(*) §§ 421–424.

(b) *Baltzell v. Moritz*, 85 Ala. 123.

(c) *Bean v. Carleton*, 51 Hun 318.

publication. In *Cramer v. Metz*,^(*) the defendant had agreed to furnish goods to be manufactured; then to buy the manufactured goods and to pay for them ten per cent. beyond the costs and expenses. The defendant only furnished part. It was held that a charge was sufficiently favorable to the defendant which directed the jury to allow the plaintiff ten per cent. on the goods which should have been furnished; but that the ten per cent. which the plaintiff was to receive should be included as part of the expense of manufacturing, thus reducing the percentage ten per cent. thereon.

The defendant guaranteed that the plaintiff should realize ten per cent. profit on certain goods; but, in fact, the goods, though sold at the market price, were sold at a loss. The measure of damages was the difference between the cost of the goods, plus ten per cent., and the amount realized from the sale of them.^(b) A contractor gave a bond to the plaintiff for the performance of his contract, and upon breach of contract the plaintiff had the right to complete the work; this right the plaintiff exercised. In an action on the bond, the plaintiff was allowed to recover the increased expense of the work, and damages paid for injuries naturally and necessarily incurred by workmen in the course of the work.^(c) The plaintiff, a water company, furnished hydrants to the defendant town, and agreed to furnish a certain amount of water; the supply fell short. In an action for the agreed price, the town was allowed to recoup the difference between the value of the water which should have been furnished and of that actually furnished.^(d) Upon the

(*) 57 N. Y. 659.

(b) *Morris v. Barrett*, 24 Oh. St. 201; *acc.* of a guaranty to sell the plaintiff's property at a certain price, *Dunn v. Mackey*, 80 Cal. 104.

(c) *Newton v. Devlin*, 134 Mass. 490.

(d) *Wiley v. Athol*, 150 Mass. 426.

breach of a contract to store fruit at a certain temperature, the measure of damages is the diminution in value of the fruit.^(*)

In the case of *Duckworth v. Ewart*,^(b) Messrs. Ratledge, the owners of building land on which they were erecting houses, having become unable to proceed with the building, and having mortgaged it to a building society for £4,300, and in lesser amounts to three mortgagees, of whom the plaintiff was one, entered into an indenture with the plaintiff and the other mortgagees and other creditors, in which it was agreed that the plaintiff should have power to sell the land, subject to the mortgage to the building society, and out of the proceeds pay the expenses of the trust and the other mortgages, and the surplus to the owners. It also empowered the plaintiff to enter on the land and finish the buildings, and also to raise any sum not exceeding £5,000 for carrying into effect the trust of the indenture by a mortgage on the premises, which should have priority over all the other mortgages except that to the building society. In the same instrument the defendant covenanted to execute all assurances for enabling the plaintiff to execute the trusts of the deed. The plaintiff entered on the execution of the trusts and incurred an expense of £1,100 on the land. He also arranged with the building society to accept £4,100 in satisfaction of their debt, and contracted with certain persons for a loan of £5,000 on the land, by a mortgage which was prepared, and was agreed to by all parties. At the last moment, when the parties had met to close the transaction, the defendant refused to execute the mortgage;

(*) *Hyde v. Mechanical Refr. Co.*, 144 Mass. 432. So of contract to keep chickens frozen: *Beeman v. Banta*, 118 N. Y. 538.

(b) 2 H. & C. 129; 33 L. J. N. S. Ex. 24.

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whereupon the building society, acting on a power of sale contained in their mortgage, foreclosed it, and sold the property at a forced sale, for £4,510, which was exhausted in paying their debt and expenses. Martin, B., was of opinion that, in addition to the costs of the proposed mortgage, the defendant was liable for the difference between £5,000 and the value of the land as building land, such as it was contemplated as being by the indenture, or at all events that he was entitled to £900, the residue of £5,000, after paying £4,100, agreed to be taken for the first mortgage. But the majority of the court, per Pollock, C. B., and Bramwell, B., held that the plaintiff was entitled to recover only the costs of the abortive mortgage. In Minnesota, the measure of damages for breach of contract to give a mortgage as security for a debt is said to be *prima facie* the amount of the debt still unpaid.^(*)

In a grant of land there was a covenant that a defendant should sink upon the demised premises a pit to the depth of 130 yards in search of coal, and, in case a marketable vein should be reached, pay the plaintiff £2,500. In an action by the plaintiff for breach of this covenant, evidence being given to show that if the defendants had sunk the pit, marketable coal might have been found, it was held that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal.^(b) In *Mine Hill & S. H. R.R. Co. v. Lippincott*,^(c) a railroad company agreed on notice to remove its road from over certain coal beds, so as to allow them to be mined.

(*) *Dye v. Forbes*, 34 Minn. 13.

(b) *Pell v. Shearman*, 10 Ex. 766.

(c) 86 Pa. 468.

The measure of damages for a breach was held to be the value of the coal in the mine. In a lease of an oil field the lessee agreed to prosecute the boring of additional wells without interruption. The measure of damages for a breach of this agreement was held to be the value of the additional oil which the plaintiff should have received, less the expense to him.^(*) The case was said to differ from that of an agreement to open a mine, for oil, unlike a mineral, must be obtained as soon as possible, or there is danger of loss. Where another well had been bored on the same tract and no oil obtained, the damages were held to be nominal.^(b)

In *Finney v. Cadwallader* ^(*) an agreement was made to establish a bank and make the defendant its manager, and to establish a line of steamers and make the defendant its agent. It was held that damages for a breach of this contract were too remote and uncertain to be estimated. In *Harrison v. Charlton*,^(d) the plaintiff purchased a lumber-yard. The lumber was to be measured, and in the meantime no lumber was to be added. For breach of the contract in adding lumber, the difference between the market and contract prices of the additional lumber was held to be the measure of damages.

Where the defendant agreed to support and care for the plaintiff's child, but neglected to give proper support, the measure of damages was held to be the difference in value between the care and treatment called for by the contract and what was actually received.^(e) The condition of a bond for the plaintiff's maintenance required the defendant to furnish the plaintiff with "money neces-

(*) *Bradford Oil Co. v. Blair*, 113 Pa. 83.

(*) *Hutchinson v. Snider*, 20 Atl. Rep. 510 (Pa.).

(*) 55 Ga. 75.

(d) 37 Ia. 134.

(e) *Vanceleave v. Clark*, 118 Ind. 61.

sary for him to spend whenever he thinks proper to visit his friends ;” the defendant was held bound to furnish a sum proper for such expenses to the extent of reasonable visits. In an action of debt upon such a bond, there having been previously a demand and refusal of the sum necessary for a visit, the plaintiff’s measure of damages was held to be the amount of money required for the visit, with interest.^(*) The defendants being engaged in a flour commission business, hired from the plaintiff for one night a canvas cover, fifty feet in length by twenty-five feet wide, to be spread over flour on board a canal-boat lying at a wharf in the city of New York. The price to be paid for the use of the canvas was the “customary charge,” which for twenty-four hours or less was proved to be one dollar. Through some oversight the cover was not returned until the lapse of about five weeks. The action was brought for the use of the canvas during the whole period last mentioned. The plaintiff insisted upon a recovery of one dollar for each day of the detention. It was held that defendants were not liable to be charged at the contract rate per day for every day during which the canvas was detained. The recovery should have been limited to the value of the use for the entire period of the detention.^(b) It will be noticed that this is the result of a fair interpretation of the contract ; for the “customary charge” for one night was not the customary charge for five weeks.

Breach of Promise of Marriage.

§ 637. **Exceptional nature of the action.**—* The action for breach of promise of marriage, as has been already said, though nominally an action founded on the breach

(*) *Berry v. Harris*, 43 N. H. 376.

(b) *Russell v. Roberts*, 3 E. D. Smith 318.

of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage.¹ (*) From the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule; and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance,² (b) subject, of course, to the general restriction that a verdict influenced by prejudice, passion, or corruption, will not be allowed to stand.^(c)** “Damages in this action,” said Mr. Justice E. D. Smith, in a case in the New York Court of Appeals, “have never been limited to the simple rule governing actions upon simple contracts for the payment of money.”^(d)

§ 638. General rule.—In a case in Massachusetts (*) it

¹ Wells v. Padgett, 8 Barb. 323.

Stout v. Prall, 1 N. J. L. 79; Green

² Southard v. Rexford, 6 Cow. 254; v. Spencer, 3 Mo. 318; Hill v. Maupin, Torre v. Summers, 2 Nott & M'C. 267; 3 Mo. 323.

Coryell v. Colbaugh, 1 N. J. L. 77;

(*) Collins v. Mack, 31 Ark. 684; Tobin v. Shaw, 45 Me. 331; Tyler v. Salley, 82 Me. 128; Vanderpool v. Richardson, 52 Mich. 336; Wilbur v. Johnson, 58 Mo. 600; Allen v. Baker, 86 N. C. 91; Daggett v. Wallace, 75 Tex. 352.

(*) Tobin v. Shaw, 45 Me. 331.

(*) Hattin v. Chapman, 46 Conn. 607 (a very strong case); Richmond v. Roberts, 98 Ill. 472. In Douglas v. Gausman, 68 Ill. 170, the court refused to set aside a verdict for \$3,600, where the defendant was worth \$25,000, saying that the court would only interfere when it was apparent that the jury had misunderstood the evidence, had been governed by passion or prejudice, or had acted with a reckless disregard of the evidence. The court will not, therefore, set aside the verdict on the ground of excessive damages, even if they think the amount “entirely disproportionate” to the case made by the proof. Goodall v. Thurman, 1 Head (Tenn.) 209.

(d) Thorn v. Knapp, 42 N. Y. 474, 483.

(*) Coolidge v. Neat, 129 Mass. 146.

was held proper for the jury to consider: First, the disappointment of plaintiff's reasonable expectations and worldly advantage of a marriage which would give her a permanent home and an advantageous establishment; second, the injury to her affections; and third, whatever mortification or distress of mind she suffered, resulting from refusal of defendant to fulfil his promise, and in connection with this, the jury may consider the length of time during which the engagement had subsisted, her wounded spirit, disgrace, insult to her feelings, and probable solitude which would result by reason of desertion. And in addition to these elements of compensation the plaintiff may recover actual outlay in preparation for the marriage. (*)

§ 639. Aggravation.—Beyond its power over excessive verdicts the court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages. So where it appears that the defendant seduced the plaintiff, this will be allowed to go to the jury in aggravation.¹ (b)

¹ *Paul v. Frazier*, 3 Mass. 71; *Green v. Spencer*, 3 Mo. 318; *Hill v. Maupin*, 3 Mo. 323; *Burks v. Shain*, 2 Bibb. 341; *Whalen v. Layman*, 2 Blackf. 194; *Wells v. Padgett*, 8 Barb. 323. The contrary has been held in Pennsylvania. *Weaver v. Bachert*, 2 Pa. St. 80. But there the improper, cruel, and indecent conduct of the defendant will go to aggravate the damages. *Baldy v. Stratton*, 11 Pa. 316.

(*) *Glasscock v. Shell*, 57 Tex. 215.

(b) *Collins v. Mack*, 31 Ark. 684; *Hattin v. Chapman*, 46 Conn. 607; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Burnett v. Simpkins*, 24 Ill. 264; *King v. Kersey*, 2 Ind. 402; *Tyler v. Salley*, 82 Me. 128; *Paul v. Frazier*, 3 Mass. 71; *Kelley v. Riley*, 106 Mass. 339; *Bennett v. Beam*, 42 Mich. 346; *Roper v. Clay*, 18 Mo. 383; *Bird v. Thompson*, 96 Mo. 424; *Coil v. Wallace*, 24 N. J. L. 291; *Kniffen v. McConnell*, 30 N. Y. 285; *Wells v. Padgett*, 8 Barb. 323; *Conn v. Wilson*, 2 Overton 233; *Daggett v. Wallace*, 75 Tex. 352; *McKinsey v. Squires*, 32 W. Va. 41. But seduction must be pleaded: *Cates v. McKinney*, 48 Ind. 562; *Tyler v. Salley*, 82 Me. 128; *Leavitt v. Cutler*, 37 Wis. 46.

In an action for breach of promise, it was held by the Supreme Court of Massachusetts, that although it might be true that damages for the seduction, as a distinct ground of action, could not be added to the damages to which the plaintiff was entitled for the breach of the alleged promise, and these damages must be awarded solely for the suffering which resulted from the defendant's refusal to perform his promise, yet that it would not follow that the act of seduction was not to be taken into consideration by the jury. The damages, even under this rule, could not be justly estimated without regarding the increased exposure to mortification and distress to which the plaintiff had been exposed by a seduction under a promise of marriage afterwards broken.^(*)

The pain and humiliation of giving birth to a bastard may, it is said, be recovered,^(b) but not loss of time, or the expense of medical attendance.^(c) But to aggravate damages, the seduction must be effected by means of the promise.^(d)

Circumstances of abruptness and humiliation with which the engagement was broken may be shown to aggravate the damages,^(e) and the length of time during which an engagement has subsisted is a proper circumstance for the jury to consider.^(f)

The jury may take into account the plaintiff's altered social position in consequence of the defendant's misconduct.^(g) And for that purpose evidence of the defend-

(*) *Sherman v. Rawson*, 102 Mass. 395. See, to the same purport, *Sauer v. Schulenberg*, 33 Md. 288; *Sheahan v. Barry*, 27 Mich. 217.

(b) *Wilds v. Bogan*, 57 Ind. 453.

(c) *Giese v. Schultz*, 53 Wis. 462.

(d) *Espy v. Jones*, 37 Ala. 379.

(e) *McPherson v. Ryan*, 59 Mich. 33.

(f) *Grant v. Willey*, 101 Mass. 356.

(g) *Berry v. Da Costa*, L. R. 1 C. P. 331. See *Smith v. Woodfine*, 1 C. B. N. S. 660, where the cases are reviewed.

ant's wealth is admissible.^(a) So for the same reason is evidence of the plaintiff's lack of property.^(b)

In *Reed v. Clark* ^(c) evidence was admitted of the plaintiff's announcement to her friends of her engagement to marry the defendant, and her invitation of them to the wedding. In this case it was further held that evidence on the plaintiff's part, of declarations made to her by the defendant immediately prior to the engagement, as to his means, justified a charge that they might take into consideration his pecuniary condition.

§ 640. *After suit brought—Justification.*—* No evidence can be given of any fact having a tendency to aggravate the damages, which has occurred after the commencement of the suit. So in an action for breach of promise, an indecent and insulting letter written by defendant to the plaintiff after suit brought cannot be proved.¹ ** But the rule observed in many of the States in actions of libel applies here, and if a plea of justification is interposed and fails, it will go in aggravation of the damages.^(d) This has been said to rest

¹ *Greenleaf v. McColey*, 14 N. H. 303. But in seduction, where a child was born after the action was commenced, damages were given for the expense consequent thereon. *Stiles v. Tilford*, 10 Wend. 338. In the one

case, however, the court took into view what was the direct and natural result of the illegal act. In the other it excluded the consideration of a new tort wholly distinct and independent from the original cause of action.

(a) *James v. Biddington*, 6 C. & P. 589; *Collins v. Mack*, 31 Ark. 684; *Douglas v. Gausman*, 68 Ill. 170; *Richmond v. Roberts*, 98 Ill. 472; *Bennett v. Beam*, 42 Mich. 346; *Johnson v. Travis*, 33 Minn. 231; *Crosier v. Craig*, 47 Hun 83; *Allen v. Baker*, 86 N. C. 91; *Olson v. Solveson*, 71 Wis. 663. In New York it is said that the defendant's pecuniary position must be proved by *reputation*: *Kniffen v. McConnell*, 30 N. Y. 285, 289. And the fact that the defendant has married a woman of wealth cannot be shown for this purpose. *Crandall v. Quin*, 51 N. Y. Super. Ct. 276.

(b) *Vanderpool v. Richardson*, 52 Mich. 336.

(c) 47 Cal. 194.

(d) *Davis v. Slagle*, 27 Mo. 600; *Thorn v. Knapp*, 42 N. Y. 474. *Contra*, *Hunter v. Hatfield*, 68 Ind. 416. Not unless made in bad faith: *Albertz v. Albertz*, 47 N. W. Rep. 95 (Wis.).

on the ground that the justification is placed on the record, and will remain there as a continual reiteration of the charge against the plaintiff, and that therefore "a trifling verdict would not show that such charge was unfounded."(*) But in New York it has been held by the court of last resort that the rule is the same, in the case of justification on the ground of unchastity, although it be not pleaded.(*) In the charge of the judge at Nisi Prius in this case, the jury were instructed that if the defendant had attempted to prove the plaintiff guilty of misconduct with other men, *of which he knew she was not guilty*, it aggravated the damages. On appeal this charge was sustained. Ingraham, J., delivered the opinion of the court on the other questions involved in the case, but dissented on the point now under discussion, on the ground that as the charge of misconduct was not set up in the answer, and was therefore not on the record, the reason of the rule did not apply. No opinion was written on this point by any other judge, but at the close of his opinion Ingraham, J., said: "A majority of the court are of the opinion that the charge was not erroneous in this respect, and that attempting to give such matters in evidence, though not set up in the answer as a defense, if not made out, warrants the charge to the jury that it should aggravate the damages." Neither in this case nor in that of *Thorn v. Knapp* (b) was the question of the effect of good or bad faith on the defendant's part, in alleging matters of justification, directly before the court; but from the language used the courts seem to incline to the opinion that it makes no difference. The rule is, in either form, an exception to the general principles upon which damages are given in actions *ex contractu*.

(*) *Kniffen v. McConnell*, 30 N. Y. 285, 293.

(b) 42 N. Y. 474.

As was said by Mr. Justice Ingraham in *Kniffen v. McConnell*:^(*) "It is an anomaly, in an action for a breach of contract, to hold that setting up matters to excuse such breach in an answer, the proof of which fails, is an aggravation of damages." The rule seems, however, too well established to be now questioned. Perhaps it would, under these circumstances, be more just to both parties to allow the jury to pass upon the question of the defendant's good or bad faith. This is the rule in many of the States.^(b) Thus in Wisconsin it is said that the question is whether the defendant had sufficient reason to believe the charges of lewdness were true or not;^(c) but in this case the court allowed the plaintiff only to give in evidence the answer put in by the defendant. She was not allowed to introduce an affidavit of the defendant as to the same facts, which was more specific, the court saying that the rule was anomalous and should not be extended. An unsuccessful attempt of the defendant to prove that while the plaintiff claimed to be waiting for the defendant to marry her, she was trying to marry another man, should not aggravate the damages.^(d)

§ 641. Mitigation.—* So, also, it is held that the defendant may show in mitigation of damages, the licentious conduct of the plaintiff, and her general character as to sobriety or virtue, without any limitation of time whatever.¹ It is also settled that, in this action, *dissolute* conduct on the part of the female *after* the promise

¹ *Johnson v. Caulkins*, 1 Johns. Cas. 116.

(*) 30 N. Y. 285, 292.

(b) *Reed v. Clark*, 47 Cal. 194; *Fidler v. McKinley*, 21 Ill. 308; *Blackburn v. Mann*, 85 Ill. 222; *Denslow v. Van Horn*, 16 Ia. 476.

(c) *Leavitt v. Cutler*, 37 Wis. 46.

(d) *Simpson v. Black*, 27 Wis. 206.

(or before if unknown) discharges the contract altogether. *Indecent* conduct *before* the promise, if unknown to the defendant, or *after* the promise, goes in mitigation of damages.¹ ** The plaintiff's breach of the criminal law by profanity, is said to go in mitigation.^(*) The fact of a female plaintiff's having had an illegitimate child, if known to the defendant at the time of the promise, is no defense to the action, but goes in mitigation.^(b) So in Illinois, the woman's connection with a man other than the defendant, before as well as after the promise, although the engagement was formed or continued by the defendant, with knowledge of the fact, goes in mitigation of the damages, on the ground that an unchaste woman cannot be injured by a breach of the marriage promise to the same extent with a virtuous one.^(c) So far, however, as the damages are a pecuniary compensation for the loss of an advantageous match, the measure should not be affected by previous misconduct of the woman which had been forgiven by the defendant. Indeed, a reputable woman's pecuniary loss would perhaps not be so great as that of one whose reputation is tarnished, as it would generally be more easily made good. Perhaps, moreover, as regards other damages, the loss of the opportunity of retrieving her name, and reassuming a position of respectability, is an injury practically equivalent to the keener mortification which a virtuous woman may be thought to sustain from the breach of such a contract. In the case, however, of the continuance of

¹ *Boynton v. Kellogg*, 3 Mass. 189; *Greenwood*, 1 C. & P. 350; *Capehart Willard v. Stone*, 7 Cowen, 22; *Palmer v. Carradine*, 4 Strob. 42. *v. Andrews*, 7 Wend. 142; *Irving v.*

(*) *Berry v. Bakeman*, 44 Me. 164.

(b) *Denslow v. Van Horn*, 16 Ia. 476.

(c) *Burnett v. Simpkins*, 24 Ill. 264; *acc. Sheahan v. Barry*, 27 Mich. 217.

the woman's wrong-doing, if such continuance be without the suitor's knowledge, she is entitled to nothing, and if with his acquiescence, to nominal damages only, both on the ground of her misconduct, and because the loss of a husband who has connived at his wife's shame inflicts no damage. It may be shown in mitigation, that the defendant was affected with an incurable disease at the time of his breach of the promise.^(*) But this should surely be dependent upon prior knowledge of the fact by the plaintiff. In *Piper v. Kingsbury* ^(b) it was held that the jury could not consider in mitigation of damages the possible consequences of an unhappy marriage with the defendant, rendered such by the want of that love and affection which a husband should bear his wife, the court saying: "It would virtually have been saying that the plaintiff ought not to recover the damage actually sustained, because the defendant might have inflicted a greater." In *Miller v. Hayes* ^(c) it was held that declarations made by the plaintiff after the commencement of the suit, to the effect that she would not marry the defendant except for his money, were not admissible in mitigation of damages. But in *Miller v. Rosier* ^(d) similar declarations, made a few days after the engagement was broken, were admitted.

It has been held by a majority of the New York Court of Appeals that the defendant might show in mitigation of damages in this action, that the breach proceeded from no change of feeling on his part, but was in deference to the wishes of his mother, a woman in infirm health.^(*) But such evidence must be taken merely as tending to reduce the standard to compensatory, and

^(*) *Sprague v. Craig*, 51 Ill. 288.

^(c) 34 Ia. 496.

^(d) *Johnson v. Jenkins*, 24 N. Y. 252.

^(b) 48 Vt. 480, 486.

^(d) 31 Mich. 475.

to exclude exemplary damages. The plaintiff cannot be the less entitled to compensation for the injury sustained, because of the circumstances which palliate the defendant's conduct. An offer by the defendant to marry the plaintiff made after suit brought, has been held not to be admissible in mitigation.^(*) In such a case the Supreme Court of Michigan said :^(b)

"The contract of marriage is one so dependent upon affection that where this is wanting, a union would be more likely to add to than lessen the damages ; instead of bringing happiness to the parties, it would be more likely to entail lifelong misery on one or both. The affection which the plaintiff may have had for the defendant, and under the influence of which she may even eagerly have accepted a matrimonial alliance with him, may by his subsequent conduct have been turned into loathing and contempt, so that a marriage which at a certain time would have been to her one of the most desirable of events, would at a subsequent period, even in thought, be repulsive.

"A supposed virtuous man of wealth, refinement, and respectability, gains the affections of a young lady, and under a promise of marriage accomplishes her ruin, then abandons her and enters upon a life of open and notorious profligacy and debauchery, and when sued he offers to carry out his agreement—offers himself in marriage, when any woman with even a spark of virtue or sensibility would shrink from his polluted touch. To hold that the offer of such a skeleton, and refusal to accept, could be considered even in mitigation of damages, would shock the sense of justice and be simply a legal outrage. Such an offer could in no way atone for the past, or have any tendency to show that the defendant had not, and was not acting in a most heartless and outrageous manner."

But these remarks must be taken in the light of the peculiar circumstances. This is, indeed, true in every case where evidence of circumstances of mitigation or aggravation is offered. It is not to be supposed that in

(*) *Kurtz v. Frank*, 76 Ind. 594 ; *contra*, *Kelly v. Renfro*, 9 Ala. 325.

(b) *Bennett v. Beam*, 42 Mich. 346, 352.

a proper case, as, for instance, where defendant had honestly believed the plaintiff to be of bad character, and subsequently discovered his mistake and offered reparation, that evidence of the facts would be rejected.

Prospective Damages.

§ 642. Entire and divisible contracts.—A question of interest and importance is sometimes presented in regard to prospective damages, or damages which accrue after the suit is brought. In the case of continuing agreements, or agreements to do specified acts at certain successive periods, * it has been doubted whether the damage should be assessed as at the time of the first breach, or whether the whole period of the contract is to be gone through, and an estimate made of the damages sustained, with reference to each period fixed for performance. This, again, depends, to a certain extent, on another question, whether the contract will admit of more than one action being brought on it, or whether the first recovery is conclusive of the plaintiff's rights. It is an ancient rule of our law that one action only can be maintained for the breach of an entire contract; and a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding;¹ ** if a plaintiff recover compensation for part of a single cause of action, it satisfies the whole.(*) But a recovery of nominal damages for the infringement of a right will not bar a suit for actual damages sustained after the bringing of the first suit; and in the case of severable contracts, successive suits for actual damages may be brought from time to time as the dam-

¹ *Rudder v. Price*, 1 H. Bl. 547; *Badger v. Titcomb*, 15 Pick. 409; *Bender-nagle v. Cocks*, 19 Wend. 207.

(*) *Marlborough v. Sisson*, 31 Conn. 332; *Baker v. Baker*, 28 N. J. L. ...
Veghte v. Hoagland, 29 N. J. L. 125.

ages are sustained, and in each suit the party may recover such damages as he has sustained before its commencement not barred by a previous recovery.^(*) *The difficulty is to determine in what cases the contract is entire. The question was first presented on contracts to pay debts by instalments. Debt was then the only form of action to recover a sum certain; and it was held that on a bond or other contract to pay divers sums on divers days, no action of debt would lie until all the days were past.¹ So stood the law until the reign of Elizabeth, when the decision in Slade's case introduced the action of assumpsit into general practice.² The rule was then modified as regards the action of assumpsit, and in cases of money payable by instalments, the plaintiff was allowed to proceed upon the first default; but it was still held that the judgment was a full satisfaction, and the plaintiff therefore recovered damages for all the prospective breaches.³ This latter rule in regard to assumpsit was further modified by a decision made in the reign of Charles II., when, in an action on an award to pay several sums at several times, the court held that an action might be brought for each sum when due, and that the plaintiff should recover damages accordingly, and have a new action as the other sums became due, *toties quoties*.⁴ The rule in debt, however, appears to have remained unaltered.⁵ So stands the matter in regard to agreements for the payment of money at specific future periods. In New York the rule which enforces the indivisibility of entire demands has been applied to open accounts for goods sold; and it has been held that the whole of such an account must be recov-

¹ Fitzh. Nat. B. 131; Taylor v. Foster, Cro. Eliz. 807; Milles v. Milles, Cro. Car. 241.

² 4 Co. 92b.

³ Beckwith v. Nott, Cro. Jac. 504.

⁴ Cooke v. Whorwood, 2 Saund. 337.

⁵ Rudder v. Price, 1 H. Bl. 547.

(*) McConnel v. Kibbe, 33 Ill. 175.

ered, if at all, in one suit.¹ But in Massachusetts the doctrine of this case has been denied.² **

§ 643. *Contract to repair.*—* The question becomes more complicated when we approach the consideration of agreements to do specific acts at various periods. In a case in New York,³ where the defendant had covenanted with the plaintiff to keep a certain gate in repair, and to use common care in shutting it when passing and repassing, it was held that if the gate was left unrepaired or open, the defendant would be responsible in an action on the covenant, and that the true measure of damages would be the amount of the plaintiff's loss by the breach proved; that for every second breach a fresh action would lie; that a refusal to rebuild the gate did not amount to a total and final breach of the covenant, nor could the damages recovered in a suit brought for one breach be presumed to have been given as a compensation for the non-performance of the covenant through all future time, so as to bar further suits.^(*) ** In *Keith v. Hinkston* ^(b) it was held that on breach of a contract to keep a "switch or spur" in good repair, and to furnish cars for transportation, the plaintiff could only recover for the damage already sustained. But it has been held that all the breaches which have actually taken place must be embraced in the first suit; and that even if they are not, a second suit will not lie for them.⁴

¹ *Guernsey v. Carver*, 8 Wend. 492; 86; and see, also, *Fish v. Folley*, 6 Bendernagle v. Cocks, 19 Wend. 207; Hill 54.

Clark v. Jones, 1 Denio 516.

⁴ *Bristowe v. Fairclough*, 1 M. & G. 143; *Pinney v. Barnes*, 17 Conn. 420.

³ *Badger v. Titcomb*, 15 Pick. 409.
² *Crain v. Beach*, 2 Barb. 120, and *Colvin v. Corwin*, 15 Wend. 557; *Bendernagle v. Cocks*, 19 Wend. 207.
s. c. on appeal, *Beach v. Crain*, 2 N.Y.

(*) *Acc. Phelps v. New Haven & N. Co.*, 43 Conn. 453. But *contra*, *Erie & P. R.R. Co. v. Johnson*, 101 Pa. 555.

(b) 9 Bush 283.

§ 644. **To support.**—In New York, a bond had been given conditioned to furnish the plaintiffs their support during their natural lives; and it was held that a failure by the obligor to provide for the obligee according to the covenant, amounted to a total breach and that full and final damages might be recovered.¹ (*) So where the plaintiff was induced to take care of a paralytic old man till his death, by his promise to “provide for her, and give her full and plenty after he was gone,” she was allowed to recover such a reasonable sum, ascertained by the annuity tables or otherwise, as would provide her with an annuity which would keep her in her condition of life, relieved from the necessity of work,^(b) or in other words, “such an amount as, with its interest, will give a sufficient support for life, leaving nothing at death.” (c) In analogy with contracts to provide for support, it has been held in Alabama that a refusal by a college to permit the plaintiff to enjoy the benefit of a permanent scholarship which he had purchased, by denying him the right to appoint a pupil, is a total breach.^(d)

§ 645. **Fluctuations in value during contract.**—There is another class of cases, namely, where the contract covers a long space of time, and during that period the services and commodities which enter into the cost of performance have fluctuated in value. Thus in a case in New York, which we have already had occasion to notice in

¹ *Shaffer v. Lee*, 8 Barb. 413, where the cases are collected at large.

(*) *Philbrook v. Burgess*, 52 Me. 271; *Fales v. Hemenway*, 64 Me. 373; *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74; *Schell v. Plumb*, 55 N. Y. 592; *Tippin v. Ward*, 5 Ore. 450. But unless the defendant's conduct was such as to put an end entirely to the contract, recovery can be had only for a partial breach. *Fay v. Guynon*, 131 Mass. 31.

(b) *Thompson v. Stevens*, 71 Pa. 161.

(c) *Freeman v. Fogg*, 82 Me. 408.

(d) *Howard College v. Turner*, 71 Ala. 429.

reference to another branch of this subject,¹ the plaintiff, in 1836, agreed to furnish and deliver marble to build a city hall, at successive periods in five successive years. In 1837 the defendants refused to receive any more. The suit was brought before, but the trial did not take place till after the period for performance had elapsed, and it was shown that the difference between the cost of the marble and the contract price, which was the measure of damages, had fluctuated considerably in the five years. On this state of facts the circuit judge charged, that "in fixing damages to be allowed the plaintiffs, the jury were to take things as they were *at the time the work was suspended*, and not allow for any increased benefit they would have received from the subsequent fall of wages or subsequent circumstances." And of this opinion was the majority of the court, on a motion for a new trial. Nelson, C. J., who delivered the leading opinion, said :

"It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years—of which about one year and a half only had expired at the time of the suspension—the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural ; the court and jury having no certain data upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim ; but in my judgment no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, *the market price on the day of the breach* is to govern in the assessment of damages. *In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance.* The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in

¹ Masterton v. Mayor of Brooklyn, 7 Hill 61, 71, 78.

cases like the present as in actions predicated upon a failure to perform at the day."

And Bronson, J., said :

"There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed, and this makes the question upon which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule ; it will best preserve the analogies of the law, and will be as likely as any other to do substantial justice to both parties."

Beardsley, J., however, dissented on this point, saying :

"The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants ; but this the plaintiffs were not bound to do. There can be no serious difficulty in assessing damages according to the principles which have been stated. The contract was made in 1836, and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting to conjecture ; for all the data necessary to form a correct estimate of the entire expense of executing the contract can now be furnished by witnesses.

"If the cause had been brought to trial before the time for

completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason however, why the injured party should not have his damages, although the difficulty in making a just assessment in such a case has been deemed a sufficient ground for decreeing specific performance. No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily, at which prices are to be ascertained and estimated, and the day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market in respect to prices is now susceptible of explicit and intelligible proof; and where that is so, it seems to me unsuitable to adopt an arbitrary period, especially as the estimate of damages must, in any event, be somewhat conjectural."¹

So in a case in Alabama,^(*) where the plaintiff had agreed to let the defendants have all the pine timber on his lands, suitable for good lumber, and the defendants to saw it into lumber, sell it as soon as they could, and pay the plaintiff one-fifth of the gross proceeds of the lumber sold and collected by them, it was held that for the breach of this contract by the defendant in not sawing all the lumber, but one action lay, in which, notwithstanding the period allowed for the performance had not expired at the time of the breach, he was entitled to the damages resulting from the prospective as well as the actual failure, to be assessed on the basis of value at the time of the breach.

In *Shaffer v. Lee*,² Hand, J., said of the case of *Masterton v. The Mayor*, "As I understand the opinions

¹ The rule laid down by the majority of the court has been followed in *Sea-
ton v. Second Municipality*, 3 La. Ann. 44; *New York & H. R. R. Co. v. Story*,
6 Barb. 419.
² 8 Barb. 412.

(*) *Fail v. McRee*, 36 Ala. 61.

delivered, all the judges considered the plaintiff entitled to recover entire and final damages for the non-fulfilment." And it is to be noticed that this was the only question actually before the court for decision. That part of the charge in the trial court quoted above was favorable to the defendant, and as the plaintiff did not except to it, the question of its correctness, upon which, as we have seen, the judges differed in opinion, was not directly involved in the decision.

§ 646. *Goodrich v. Hubbard*.—The contract may be sued upon either after the time for its performance has expired, or while it is still running. In the case just cited the plaintiff sued at once on breach. In a Michigan case (*) a logging contract provided that the logger should haul the logs during the winter next ensuing if the weather should permit; if the weather should be unfavorable, the contract was to be continued to another winter. Owing to the weather, the logger postponed what remained undone the first winter; but the defendants prevented complete performance by removing the logs before the next winter. In the ensuing winter the logger could have delivered the logs for half the contract rate, being much less than it would have cost him the first winter. It was held that he was entitled to recover the difference between the contract price and what it would have cost him to deliver the logs during the second winter. In this Michigan case the point at issue was whether the plaintiff's recovery must be the contract price, less the cost of performance, during the first or the second winter, because although the time of performance was the second winter, the time when the defendants

(*) *Goodrich v. Hubbard*, 51 Mich. 62.

prevented performance was earlier. The Supreme Court of Michigan said : (*)

"It is objected that the profits must be ascertained on the day of the breach ; that to attempt to ascertain the damages in any other way would be speculative, uncertain, and conjectural. The case of *Masterton v. Mayor of Brooklyn* is cited as authority, but an examination of that case shows that the court made the market price on the day of the breach of the contract to govern in assessment of damages to depend upon the opposite party having elected to consider the contract broken before the arrival of the time for full performance. The facts of this case were somewhat exceptional, there being a claim for a breach of a contract running through a period of five years, of which about one year and a half only had expired, the court and jury having no certain data upon which to estimate the profits for the remaining three years and a half.(*) That case is not applicable here, where the election of the plaintiff to consider the contract broken before arrival of the time for its full performance does not appear ; and upon the facts found it does appear that there are certain data for estimating the damages found. The consideration of profits cannot be separated in this case from the circumstances under which the work was to be done, and the prevention of which constitutes the breach making the defendants liable.

"There is no element of uncertainty regarding the profits the plaintiff would have realized from the performance of the contract, and which must govern in the estimate of damages. There are no contingencies modifying or taking the case out of the rule laid down by this court in the case of *Burrell v. New York & Saginaw Solar Salt Co.*" (c)

§ 647. Probable future expense of performing.—In a case in Vermont a different rule was laid down. The defendants, a bridge company, had, in September, 1830, agreed with the plaintiffs to keep a bridge in repair for twelve years, on the plaintiffs' paying twenty-five dollars every year. The plaintiffs paid the annual sum

(*) 51 Mich. 62, 70, *per* Sherwood, J.

(*) This seems to be a mistake. See statement of the case above.

(c) 14 Mich. 34.

until 1838, when the defendants ceased to repair; and the judge charged at the trial, that the jury "should limit their inquiries to the time when both the parties ceased in fact to act under the contract." But on motion for a new trial the court said: "The rule of damages in this case should have been, to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract, and thus assess the entire damages for the remaining twelve years."¹

In *Roper v. Johnson* (*) the defendant agreed to deliver coal to the plaintiff for a certain price during the months of May, June, July, and August. In June, the defendants refused to deliver any more coal; suit was brought in July, and the trial took place in August, before the expiration of the time for performance. The price of coal was continually rising. A verdict was found, based on the actual price of coal to the time of trial, and a *probable further rise in price during the remainder of August*. This verdict was sustained by the Court of Common Pleas. Brett, J., said: (b) "When you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach." The defendant might, however, reduce these damages by showing that the plaintiff should have secured another contract at the time of breach.

§ 648. General conclusions.—It will be seen from the foregoing that two extreme rules have been laid down:

¹ *Royalton v. R. & W. Turnpike Co.*, 14 Vt. 311.

(*) L. R. 8 C. P. 167; *acc.* *Brown v. Muller*, L. R. 7 Ex. 319, 323, *per* Kelley, C. B.

(b) p. 180.

one, that in calculating the cost of performance, the market rates at the time of breach are to govern ; the other, that the market rates down to the time of trial, and even the *probable future course of the market* (if the time of performance extends beyond the time of trial), may be considered. Under the first rule, the recovery would not be affected by the time selected for the trial ; under the second rule, if the trial took place in advance of the time fixed for performance the measure of recovery would be dependent partly on rates existing at the time of the breach and partly upon conjecture as to the future course of the market. If the trial were postponed, for the conjectural rates would be substituted the now ascertained market rates. The case may easily be supposed of a new trial for error, in which second trial it will appear that the conjectural rates allowed in the first trial were not justified by the actual course of the market. Of course in all such cases, the *measure of damages* is always the same ; but the actual recovery, as we have seen, may be more or less, according as the time of trial is earlier or later. But the allowance of conjectural rates, or the consideration of the probable future course of the market, seems to be in conflict with all the rules requiring certainty of proof. It would be almost impossible to foretell, with that degree of certainty required of a plaintiff in proving the amount of his damages, that the price of performance would decrease by any certain amount during the period fixed for performance ; and, on the other hand, after the plaintiff had shown what the cost of performance would be, reckoned according to circumstances at the time of trial, it would be as difficult for the defendant to show that a change would take place. The principle requiring certainty of proof would lead to the rule that damages on account of all work to be done

after *the date of the trial* should in the ordinary case be estimated according to the state of affairs *at the time of trial*. If, however, the period fixed for the complete performance of the contract has passed before the trial, there is no uncertainty as to the actual cost of performance, as Beardsley, J., points out in his opinion in the case of *Masterton v. The Mayor*. The contract price and the exact cost of performance can be shown, and the difference between them is the measure of damages. This is not affected by the fact that at the time of breach the amount could not be certainly known. In many cases circumstances occurring after the injury determine the amount of damages. The opinion of the majority of the court in *Masterton v. The Mayor* in this respect seems to have been based upon the old notion, now abandoned, that no circumstances occurring after the injury can be resorted to for aid in fixing the amount of loss (*)

Perhaps, on principle, a distinction should be made among agreements of this class. If the contract is, in its nature, capable of division, as to deliver the crops of a farm for several successive years, and if the periods have arrived before suit brought, there seems no reason why a separate action may not be brought for every refusal to perform, nor why the damages should not be estimated as at every period fixed for performance.¹ (b) But where

¹ In England, it has been several times held in chancery, in regard to future agreements, that the difficulty of arriving at any true rule of damages is a good ground for a decree for specific performance. *Buxton v. Lister*, 3 Atk. 383, and *Taylor v. Neville*, cited therein; *Ball v. Coggs*, 1 Bro. Parl. Cas. 140; and *Adderley v. Dixon*, 1 Sim. & Stuart, 607. In this last case the vice-chancellor said: "The profit upon the

contract being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. Damages might be no complete remedy, being to be calculated merely by conjecture." This language seems to imply that, at law, the whole period of the contract would be inquired into, on the principle of the Vermont decision.

(*) § 85.

(b) *Brown v. Muller*, L. R. 7 Ex. 319.

the contract is intrinsically indivisible, as in the case of a building contract, for instance, one refusal may properly be considered as an absolute breach ; and then we have presented the question involved in *Masterton v. The Mayor*. If the periods specified in the contract have not arrived before the trial of the cause, any effort to fix the rights of the parties at those various times must be mere matter of conjecture ; and *probable expense* is neither a precise nor a safe direction for a jury.

IMPLIED OR QUASI CONTRACTS.

No Express Contract.

§ 649. *Quantum meruit*.—* We have thus far spoken of express contracts made by the parties ; we have still to speak of the agreements which, in the absence of any express stipulation, the law implies from a given state of facts. For property transferred or services rendered by one to another, the law implies a promise to pay what the thing or the property is worth. The party then recovers, to use technical language, on a *quantum meruit* or a *quantum valebat*; and the measure of damages becomes a question of evidence as to the value of the property or services. Nor can this rule be varied, except by express agreement. Thus, where a father, whose infant daughter was employed by a manufacturing company, forbade them to employ her any longer, and gave them notice that if they did so he should demand a given sum for her time and labor, it was held, in an action of assumpsit against the company, that the notice was unavailing to fix the measure of compensation, and that he could only recover what her services were reasonably worth.^{1**}

¹ *Adams v. Woonsocket Co.* 11 Met. 327.

§ 650. **Measure of compensation on a quantum meruit.**—When recovery is had on a *quantum meruit* for services rendered to or benefit conferred upon the defendant at his request, the measure of compensation is the value of the work done, or in some cases the money paid, not the benefit derived by the defendant from it; (*) and the same is true where the services or benefit are accepted by the defendant, though not originally rendered at his request. (b) Thus, where an agent without his principal's authority borrows money and invests it in property, the principals, by afterwards appropriating and selling the property for their own benefit, will be held to have ratified the act; and the measure of their liability is the amount borrowed, and not that realized from the sale. (c) It has been held that if the plaintiff has once charged a certain amount, which has been paid, and a receipt taken in full, no greater amount can be recovered, because the jury should put no greater estimate on the value of his services than he himself put upon them. (d) The true bar to recovery in such a case seems to be that the acceptance of a certain amount in full is an accord and satisfaction.

§ 651. **Contract void by statute of frauds.**—In an action for work and labor, the rule of damages is the value of the service rendered, and not an oral agreement as to wages, ruled out under the statute of frauds. (e) Where

(*) *Turner v. Webster*, 24 Kas. 38; *Bradley v. Rea*, 14 All. 20; *Stowe v. Buttrick*, 125 Mass. 449; *Mooney v. York Iron Co.*, 46 N. W. Rep. 376 (Mich.); *Edington v. Pickle*, 1 Sneed 122.

(b) *Hayward v. Leonard*, 7 Pick. 181; *Bee Printing Co. v. Hichborn*, 4 All. 63; *Chase v. Corcoran*, 106 Mass. 286.

(c) *Watson v. Bigelow*, 47 Mo. 413. (d) *Danziger v. Hoyt*, 46 Hun 270.

(e) *Butcher Steel Works v. Atkinson*, 68 Ill. 421; *Emery v. Smith*, 46 N. H. 151; *Day v. New York C. R.R. Co.*, 51 N. Y. 583, 590; *Rosepaugh v. Vredenburg*, 16 Hun 60. But *contra*, *Fuller v. Rice*, 52 Mich. 435; *La Du-King M. Co. v. La Du*, 36 Minn. 473.

a parol contract for the sale of land is void or unenforceable by the statute of frauds, a vendee can frequently recover the consideration, generally under one of the common counts.^(*) In *Bender v. Bender* ^(b) the rule is stated to be "Compensation for all that the plaintiff did in pursuance of the contract and in satisfaction of his part thereof, and for all permanent improvements made upon the land in reliance upon the contract with the knowledge of the defendant, deducting the value of the rents and profits during the plaintiff's occupancy." In California the measure of an intended vendee's damages is the money he has advanced, with interest, or the reasonable value of the services rendered, without reference to the express contract, and evidence of the value of the land is inadmissible.^(c) In New Hampshire it is held that the actual loss sustained and expense incurred under all the circumstances of the case, taking the agreement into consideration, furnish the measure of the damages which the jury, if they see fit, may make equal to the value of the land.^(d) In Mississippi, where the proposed vendor of land in bad faith refuses to consummate a parol agreement for the sale of land, the proposed vendee is entitled to compensation for the trouble and loss of time incurred in consequence of his confidence in the other, but not for the loss of his bargain.^(e)

§ 652. *Failure of consideration.*—The amount paid, with interest, is the measure of damages in assumpsit to recover for failure of consideration.^(f) In *James v. Hods-*

(*) *Tripp v. Bishop*, 56 Pa. 424; *Harris v. Harris*, 70 Pa. 170.

(b) 37 Pa. 419.

(c) *Fuller v. Reed*, 38 Cal. 99.

(d) *Ham v. Goodrich*, 37 N. H. 185.

(e) *Welch v. Lawson*, 32 Miss. 170.

(f) *Tyler v. Bailey*, 71 Ill. 34.

den,^(*) the plaintiff had given his notes for a patent fraudulently represented to have some value. He compromised some of the notes. In assumpsit to recover for the failure of consideration, it was held that he could recover the amount paid to compromise the notes, even assuming that he could have defended them, for he was not bound to follow them through a long course of litigation, and it would be presumed he did his best.

§ 653. *Compensation for work and labor.*—Where one has incurred necessary expense or sustained damages in protecting another's property which is accidentally beyond the owner's control, and it is afterwards reclaimed by the owner, the law implies a promise to pay the expense or compensate for the damage.^(b)

Upon Part Performance of Express Contract.

1. PLAINTIFF NOT IN DEFAULT.

§ 654. *Recovery on a quantum meruit or on the contract.*—According to the prevailing opinion, where there is a contract for labor, and an entire sum to be paid for it, and the plaintiff has performed a part according to its terms, and has been prevented from performing the whole by the defendant, he may sue either on the contract to recover damages for the breach of it, or in general assumpsit to recover for the value of what he has done. If he sue on the contract, he must set it forth specially, and then his damages for what he has done under it must be regulated by the contract price, and he will recover such a proportion of the whole of that price as the work he has done bears to the whole work. And in such a suit he may recover whatever other damages he may have sustained by the defendant's breach; as, for

(*) 47 Vt. 127.

(b) *Sheldon v. Sherman*, 42 Barb. 368.

instance, if the contract were a profitable one, the profit he would have made by being allowed to complete it, and the damages he may have incurred in providing labor and means to perform the residue. If he choose to waive the contract and sue in general assumpsit for work and labor, then his measure of damages will be a reasonable compensation for the work actually performed. He is not then limited to a recovery of his *pro rata* share of the agreed price.^(*) So where the plaintiff had agreed with the defendants to make a section of an aqueduct, to be paid one dollar per cubic yard for rock excavation, the defendants stopped the work when about half of it was done. The plaintiff proved that he had lost on the part of the work which he had executed (that being the most expensive), estimating it at the contract price of one dollar per yard, the sum of \$46,800, and that he would have made a profit on that portion of the contract which remained to be executed when the work was suspended, equal to the amount of his loss on the work done. The Court of Appeals, overruling the Supreme Court, held that the plaintiff should recover the actual value of the work done, without regard to the contract price.^(b) Pratt, J., said:

“When parties deviate from the terms of a special contract, the contract price will, as far as applicable, generally be the rule of damages. But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfil the contract; or he

(*) *Lincoln v. Schwartz*, 70 Ill. 134; *Kearney v. Doyle*, 22 Mich. 294; *Cadman v. Markle*, 76 Mich. 448; *McCullough v. Baker*, 47 Mo. 401; *Merrill v. Ithaca & O. R.R. Co.*, 16 Wend. 586; *Moran v. McSwegan*, 33 N. Y. Super. Ct. 350; *Buffkin v. Baird*, 73 N. C. 283; *Chamberlin v. Scott*, 33 Vt. 80.

(b) *Clark v. Mayor of New York*, 4 N. Y. 338, 343, reversing 3 Barb. 288.

may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth."

The Supreme Court of Ohio, in discussing this decision, dissent from these views and declare it as a rule in all cases that "the express contract furnishes the measure of damages to the extent of the evidence it affords, and to the same extent as in cases where the contract continues in force, but remains neglected and unperformed by the defendant," and that this rule remains the same, notwithstanding the contract was terminated by the defendant against the plaintiff's consent.^(a)

Where through the plaintiff's illness, or otherwise through the act of God or of the law, a contract is not completed, a recovery can be had for what is done under it to an amount measured by the value of the service, but limited by the terms of the contract.^(b) So where an agent was employed to superintend the construction of an engineering work under a contract by which he was to receive as compensation a third of the profits besides a salary, but died after the greater part of the work had been done, and it was afterwards finished at a large profit, it was held, in an action brought by his executors, that they were entitled to recover the *pro rata* proportion of the salary and of the profits under the contract, which last were measured by taking one-third of such a

^(a) Doolittle v. McCullough, 12 Oh. St. 360; *acc.* Preble v. Bottom, 27 Vt. 249.

^(b) Doster v. Brown, 25 Ga. 24; Fuller v. Brown, 11 Met. 440; Harrington v. Fall River Iron Works, 119 Mass. 82; La Du-King M. Co. v. La Du, 36 Minn. 473; Callahan v. Shotwell, 60 Mo. 398; Jones v. Judd, 4 N. Y. 411; Wolfe v. Howes, 20 N. Y. 197. In Fahy v. North, 19 Barb. 341, the recovery was held not to be governed by the contract rate. In Hubbard v. Belden, 27 Vt. 645; Patrick v. Putnam, 27 Vt. 759, the amount recovered was reduced by the damages sustained by the employer from the plaintiff's absence.

proportion of the whole profits earned and received by the defendant, as the cost of the work done at the time of the testator's death bore to that of the completed undertaking.^(a)

Where the work of construction was stopped by the public authorities, it was held that the plaintiff could recover at the contract rate for the work that had already been performed.^(b) In Louisiana, a contract made by a partnership as undertakers for the construction of a railroad will be cancelled by the death of any of the parties, and the other contracting party is only bound to pay the value of the work already done, and that of the materials already prepared, proportionably to the price agreed on.¹

§ 655. Deviation from contract by consent—Extra work.—* So, also, where work is done under a special agreement at estimated prices, and there is a deviation from the original plan, by the *consent of the parties*, the contract is made the rule of payment, as far as it can be traced, and for the extra labor the party is entitled to his *quantum meruit*.^(c) ** Where the performance of a special contract was prevented by the defendant, and suit brought on the common counts, the Supreme Court of New York said :²

“ The defendant may give the contract in evidence with a view to lessen the quantum of damages. So far as the work was done under the special contract, the prices specified in it are, as a

¹ McCord v. The West Feliciana R.R. Co., 3 La. Ann. 285.

² Koon v. Greenman, 7 Wend. 121, 123.

(a) Clark v. Gilbert, 26 N. Y. 279.

(b) Heine v. Meyer, 61 N. Y. 171.

(c) Robson v. Godfrey, 1 Holt N. P. 236; Brigham v. Hawley, 17 Ill. 38; McClelland v. Snider, 18 Ill. 58; Wright v. Wright, 1 Litt. 179; Western v. Sharp, 14 B. Mon. 177; Annapolis & B. S. L. R.R. Co. v. Ross, 68 Md. 310; Wheeden v. Fiske, 50 N. H. 125; Hollinshead v. Mactier, 13 Wend. 276; McCormick v. Connolly, 2 Bay 401.

general rule, to be taken as the best evidence of the value of the work. Where it does not appear that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made, or than it otherwise would have been, in consequence of the improper interference of the defendant, or of his neglect or omission to perform what by the contract he was bound to do, the contract prices should be held conclusive between the parties. But if the defendant neglect to furnish the materials which he was to find in due time, so that the plaintiff is obliged to do his work at a less favorable season, and at an additional expense, such expense ought to be taken into consideration and added to the contract price."

It is the duty of a contractor who has undertaken a piece of work, such as the erection of a house for a specified price, but without specification as to the manner or style of the work, when he proposes to do any part of it in a more costly style than would be justified by the agreed price, to inform the employer of the difference in cost. The employer has *prima facie* a right to suppose, unless apprised of the contrary, that every proposition as to different parts of the work is made under the contract for the whole, and is intended merely to present him with a choice of modes within that contract. To get rid of this inference, the contractor must show, either that he notified his employer that his proposition was a departure from the original design and contract, and would be attended with increased cost, or that its character necessarily gave him this information. As to costly work done in his absence, and in a manner not previously approved by him, it is not enough to show that on his return he was pleased with its appearance, and did not order it to be removed. The rule sanctioning payments for alterations and additions not originally contemplated, as far as the work can be traced under the contract, must be so applied as not to violate the above principles. Nor,

it seems, should extra work, either in quantity or quality, unless done under an express agreement or on a statement of the price, be charged for at a greater rate in reference to the market value of such work than the contract bears to the market value of the work contracted to be done.^(a)

If, however, circumstances have occurred which made the extra work more costly than it was at the time the contract was entered into, the contract price ceases to be a guide in estimating the compensation for the extra work.^(b) So in a case where the plaintiff entered into a written contract with the defendants to construct a section of a canal, to receive nine cents per cubic foot for excavation, forty cents per cubic yard for rock, and eleven cents for embankment; and the defendants had so far rescinded the contract as to enable the plaintiff to recover in the form of a *quantum meruit*, the plaintiff was held at liberty to recover for excavating *hard pan* (that not being mentioned nor included in the contract), at the rate which it was worth; and to prove the value of his labor in this respect, wholly irrespective of the contract. The contract contained a provision that the judgment of the defendant's engineer should, in case of a difference between the parties, be conclusive; but this was held not to apply to the hard pan.¹

Where the deviation consisted in a cheapening of the construction, it has been held that the difference in value between the parts so constructed, and constructed as the contract required, should be deducted from the contract price.^(c)

¹ Dubois v. Delaware & Hudson Wend. 87. In Alabama, see Aikin v. Canal Co., 4 Wend. 285; s. c. 12 Bloodgood, 12 Ala. 221. Wend. 334; and s. c. in error, 15

(a) Jones v. Woodbury, 11 B. Mon. 167.

(b) Harrison Co. v. Byrne, 67 Ind. 21.

(c) Goldsmith v. Hand, 26 Oh. St. 101.

§ 656. **Acceptance of work not according to the contract.**—The measure of damages in an action on the common counts for work accepted, but not done according to the contract, should be the value of the work, with the right in the defendant to recoup damages for the non-performance.^(a) The same is true when the defendant impliedly accepts the work by seeing it performed without objection. Thus where the contractor is in default, so that he cannot sue upon his contract, but the other party has stood by and seen him prosecute the work without objection, and been benefited by his labor and materials, the contractor is entitled to compensation to the extent of such benefit. But the profits which he might have made if he had complied with his engagement, cannot be included in his damages.^(b) The law in such case implies a promise on the other's part to pay what the labor was reasonably worth, of which the special contract will furnish evidence.^(c) Where work is to be done within a certain time, the employer, by allowing it to go on after the time has expired, waives his right to rescind on that account, and can only claim such damages from the employé as he may have sustained by the delay.^(d) But other objections are not thereby waived.^(e) Where the work accepted was in an incomplete state, the contract price is to be reduced by the sum required to complete it.^(f) But where it was completed, but lacking in quality, the contract price is to be reduced by the difference

^(a) *Dermott v. Jones*, 23 How. 220; *Epperly v. Bailey*, 3 Ind. 72; *Phelps v. Beebe*, 71 Mich. 554.

^(b) *Carland v. New Orleans*, 13 La. Ann. 43.

^(c) *Jewell v. Schroeppel*, 4 Cow. 564.

^(d) *Sinclair v. Tallmadge*, 35 Barb. 602.

^(e) *Nibbe v. Brauhn*, 24 Ill. 268.

^(f) *Manville v. McCoy*, 3 Ind. 148; *Hayden v. Madison*, 7 Me. 76; *Goldsmith v. Hand*, 26 Oh. St. 101.

in value of the work as it should have been by the contract and as it actually was ; (*) since it may never be made to comply with the contract requirements.

§ 657. **Recovery upon substantial performance by plaintiff.**—Where a builder had substantially complied with a contract to build a house, except in some comparatively slight deviations, it was held he could recover the contract price less the diminution in value to the owner on account of the deviations.^(b) In such a case the jury were told at the trial to consider what *the house was worth* to the defendant, and give that sum in damages, —on a motion for a new trial, this was held wrong, the court saying : “The house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures.” And a new trial was granted.¹(*) In an action for negligence in building a cellar under a house, the rule of damages is the amount in money which the value of the cellar and building falls short of what it would have been if the work had been done according to the contract. This difference includes both the cost of supplying such

¹ *Hayward v. Leonard*, 7 Pick. 181.

(*) *The Isaac Newton*. 1 Abb. Adm. 11; *Morton v. Harrison*, 52 N. Y. Super. Ct. 305.

(b) *Cullen v. Sears*, 112 Mass. 299.

(c) *Acc. Cutler v. Close*, 5 C. & P. 337; *Thornton v. Place*, 1 Moo. & Rob. 218; *Crookshank v. Mallory*, 2 Greene (Ia.) 257; *Tait v. Sherman*, 10 Ia. 60; *Corwin v. Wallace*, 17 Ia. 374; *White v. Oliver*, 36 Me. 92; *White v. Brockway*, 40 Mich. 209; *Marsh v. Richards*, 29 Mo. 99; *Wadleigh v. Sutton*, 6 N. H. 15; *Laton v. King*, 19 N. H. 280; *Davis v. Barrington*, 30 N. H. 517; *Horn v. Batchelder*, 41 N. H. 86; *Kane v. Ohio Stone Co.*, 39 Oh. St. 1; *Davidson v. Edgar*, 5 Tex. 492; *Hillyard v. Crabtree*, 11 Tex. 264; *Morrow v. Huntoon*, 25 Vt. 9; *Morrison v. Cummings*, 26 Vt. 486; *Bishop v. Price*, 24 Wis. 480.

deficiencies as could be supplied without expense disproportioned to the value of the building, and also in the case of such as could not be so supplied, the further or independent diminution in value thereby caused.^(*) In this case the action was tort, but there had been a contract, and the decision seems to be rested by the court upon the general principle in such cases.

Where work is completed, though not within the agreed time, there may be a recovery in *indebitatus assumpsit* for its value, if time is not of the essence of the contract. The special contract will furnish a rule to measure the damages. So far as performance is defective in *time*, it admits of compensation. Where there was delay in completing a steamboat within the time, the measure of damages was not what it would cost the party to hire another boat for the time, but what would be the *ordinary* hire of such a boat; and in case of defective work, what would be the cost of repairs and the ordinary hire of a boat during the time necessary to make them.^(b) If time is of the essence of the contract, a failure to complete the performance in time should prevent recovery altogether by the plaintiff.^(c)

2. PLAINTIFF IN DEFAULT.

§ 658. Question of recovery doubtful.—Where the contract is, on its face, an entire one, and has been performed only in part, but without excuse, compensation is sometimes sought for what has been actually done.¹

* Such are cases of agreements to work for a specified time for a given sum, where the party employed quits

¹ Campbell v. Gates, 10 Pa. 483.

(*) Moulton v. McOwen, 103 Mass. 587.

(b) Brown v. Foster, 51 Pa. 165.

(c) Slater v. Emerson, 19 How. 224.

his employment without the consent of the other, and before the period fixed ; agreements to deliver a certain quantity of goods, and delivery of only a part ; agreements to do work, as building, for instance, according to certain specifications, where the work is done, but the specifications are departed from ; whether in these cases the party failing to perform his agreement strictly has any redress whatever, and to what extent, is a very delicate and much vexed question, which perhaps more properly belongs to the subject of the right of action than that of the measure of damages. The better and sounder rule would seem to be, that unless there is a waiver of the privileged performance, or an acceptance of the partial performance, there can be no recovery. In cases of this kind, where the plaintiff is held entitled to recover anything, the agreement of the parties, not having been completely performed, cannot be conclusive as to the remuneration. Other evidence must be resorted to, and other considerations affect the result. Still, the contract to a certain extent furnishes the measure of remuneration.** As to the right to recover, the authorities are in conflict.

§ 659. *Jurisdictions refusing recovery.*—According to the better view, in the case of an entire executory contract, which the plaintiff without legal excuse has failed to fulfil on his part, he can recover nothing, either on the contract itself or on a *quantum meruit*. Some courts have refused in such case to modify the contract of the parties, or substitute another by sanctioning a recovery to any extent.(*) In the case of *Smith v. Brady*(b) the

(*) *Cutter v. Powell*, 6 T. R. 320 ; *Sinclair v. Bowles*, 9 B. & C. 92 ; *Kingdom v. Cox*, 5 C. B. 522 ; *Dermott v. Jones*, 2 Wall. 1 ; *Hutchinson v. Wetmore*, 2 Cal. 310 ; *Gill v. Vogler*, 52 Md. 663 ; *Olmstead v. Beale*, 19 Pick.

(b) 17 N. Y. 173.

subject is fully discussed, and the principle applied to the case of a contract by a builder to erect a building (for which he is to be paid on its completion) on another's land, according to certain specifications, between which and the building as erected there is a substantial disagreement. In such a case the enforced occupation of the building by the owner is not a waiver of the condition precedent, and although the owner of the land necessarily becomes the owner also of the structure thus attached to his freehold, and cannot be obliged to tear it down, he is nevertheless under no obligation to pay for it. The main question is whether, under the circumstances of the particular case, there has been *a voluntary acceptance by the defendant of the plaintiff's incomplete performance*. Where such voluntary acceptance is shown, the recovery on the *quantum meruit* may be had subject to such deduction for damage to the defendant as the plaintiff's failure may have occasioned.^(*) If the acceptance was involuntary, or was compelled only by the necessity of the case, or the defendant's wish to retain property of his own to which the plaintiff's work was an incident or a necessary adjunct, there is no right of recovery.^(b)

§ 660. Jurisdictions allowing recovery—*Britton v. Turner*.—Recovery was first allowed in such cases in the leading

528; *Veazie v. Hosmer*, 11 Gray 396; *Wooten v. Read*, 2 Sm. & M. 585; *Posey v. Garth*, 7 Mo. 94; *Caldwell v. Dickson*, 17 Mo. 575; *Schnerr v. Lemp*, 19 Mo. 40; *Champlin v. Rowley*, 18 Wend. 187; *Pullman v. Corning*, 9 N. Y. 93; *Lawson v. Hogan*, 93 N. Y. 39; *Neville v. Frost*, 2 E. D. Smith 62; *Allen v. Curles*, 6 Oh. St. 505; *Larkin v. Buck*, 11 Oh. St. 561; *Martin v. Schoenberger*, 8 W. & S. 367; *Bryant v. Stilwell*, 24 Pa. 314; *Jones v. Marsh*, 22 Vt. 144 (followed, as to law in Vermont, in *Jordan v. Fitz*, 63 N. H. 227).

(*) *Bee Printing Co. v. Hichborn*, 4 All. 63; *Pullman v. Corning*, 9 N. Y. 93.

(b) *Eldridge v. Rowe*, 7 Ill. 91; *Lowe v. Sinklear*, 27 Mo. 308.

case of *Britton v. Turner*.¹ In an action for work and labor, it appeared that the plaintiff had agreed to work for the defendant one year for a given sum, and that before the expiration of the time agreed on he had quitted his service without the defendant's consent, and on this he was held entitled to recover for the time he was employed. Parker, C. J., after commenting on the extreme disagreement and want of harmony among the cases, and calling particular attention to those where a recovery had been allowed on partial performance of agreements to build, proceeded to say :

"The cases for building, etc., are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it, elect to take no benefit from what has been performed, and therefore if he does receive he shall be bound to pay the value ; whereas, in a contract for labor merely, from day to day, the party is continually receiving the benefit of the contract, under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

"But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them.

"The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term. . . . It is said that in those cases where the plaintiff has been permitted to recover, there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed ; and although the other may

¹ 6 N. H. 481, 488.

not eventually do all he has contracted to do, there has been necessarily an acceptance of what has been done in pursuance of the contract, and the party must have understood, when he made the contract, that there was to be such acceptance. . . . We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. . . . We hold, then, where a party undertakes to pay upon a special contract for the performance of labor or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract, the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

“In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement, he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done or furnished, and upon the whole case derives a benefit from it.

“But if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to recover on his new case for the work done, not as agreed, yet accepted by the defendant.

“If, on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done

toward the performance. He has, in such case, received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay; because his express promise was only to pay on receiving the whole, and having actually received nothing, the law cannot and ought not to raise an implied promise to pay.

"But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. And the rule is the same, whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time, until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent. . . . The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction; and in estimating the value of the labor, the contract price for the service cannot be exceeded.

"If a person makes a contract fairly, he is entitled to have it fully performed; and if this is not done, he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non-performance.

"The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense, he is entitled so to do; and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

"If in such case it be found that the damages are equal to or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover. . . . There may be instances, however, where the damage occasioned is much greater than the value of

the labor performed ; and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defense, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be.

“And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him ; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for farther damages.”

The case of *Britton v. Turner* has been followed, with more or less modification, in perhaps a majority of the jurisdictions in this country.^(a) Recovery should be at the contract rate,^(b) less damages caused the defendant by failure to complete the performance.^(c)

§ 661. *Rule in Vermont.*—In Vermont the right of recovery seems to turn, not only where the contract is substantially performed, but in all cases, not on the plaintiff's voluntary acceptance, but on the benefit supposed to be conferred by the work done. In the case of *Kelly v. Bradford*,^(d) Aldis, J., delivering the opinion of the Supreme Court of that State, says :

(a) *McKinney v. Springer*, 3 Ind. 59, by which the prior cases of *Swift v. Williams*, 2 Ind. 365, and *Hoagland v. Moore*, 2 Blackf. 167, are overruled as to the point in question ; *Barr v. Van Duyn*, 45 Ia. 228 ; *Duncan v. Baker*, 21 Kas. 99 ; *Wilson v. Wagar*, 26 Mich. 452 ; *Begole v. McKenzie*, 26 Mich. 470 ; *Keystone L. & S. M. Co. v. Dole*, 43 Mich. 370 ; *Fuller v. Rice*, 52 Mich. 435 ; *Downey v. Burke*, 23 Mo. 228 ; *Barcus v. Hannibal R. C. & P. P. R. Co.*, 26 Mo. 102 ; *Marsh v. Richards*, 29 Mo. 99 ; *Parcell v. McComber*, 11 Neb. 209 ; *Gorman v. Bellamy*, 82 N. C. 496 ; *Steeple v. Newton*, 7 Ore. 110 ; *Jones v. Jones*, 2 Swan 605 ; *Carroll v. Welch*, 26 Tex. 147.

(b) *Dobbins v. Higgins*, 78 Ill. 440 ; *Barcus v. Hannibal R. C. & P. P. R. Co.*, 26 Mo. 102 ; *Marsh v. Richards*, 29 Mo. 99. Or if not so, the contract rate should be shown as bearing on the question of compensation.

(c) *Keystone L. & S. M. Co. v. Dole*, 43 Mich. 370 ; *Fuller v. Rice*, 52 Mich. 435.

(d) 33 Vt. 35.

"Where a contract has been substantially though not strictly performed—where the party failing to perform according to the terms of his contract has not been guilty of a voluntary abandonment or wilful departure from the contract, has acted in good faith, intending to perform the contract according to its stipulations, but has failed in a strict compliance with its provisions, and where from the nature of the contract, and of the labor performed the parties cannot rescind, and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the other,—in such case the party failing to perform his contract strictly, may recover of the other as upon a *quantum meruit* for such a sum only as the contract as performed has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work."

And the rule by which compensation is to be made for the partial performance of the contract, is thus declared:

"The party failing to perform must first deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms; or where that is impossible or unreasonable, such a sum as will fully compensate him for the imperfection in the work and insufficiency of the materials, so that he shall in this respect be made as good, pecuniarily, as if the contract had been strictly performed. *ad*. Whatever additional damages his breach of the contract may have occasioned to the other."

Later decisions firmly maintain in that State the same *quasi* equitable doctrine in actions at law, holding that where the stipulations are not in the nature of conditions precedent, a party who but partly fulfils his contract may recover for what has been done under it to the extent that such partial performance has benefited the other.^(*) So in the same State, where one agrees to

(*) *Dyer v. Jones*, 8 Vt. 205; *Gilman v. Hall*, 11 Vt. 510; *Brackett v. Morse*, 23 Vt. 554; *Morrison v. Cummings*, 26 Vt. 486; *Hubbard v. Belden*, 27 Vt. 645; *Barker v. Troy & Rutland R.R. Co.*, 27 Vt. 766; *Kettle v. Harvey*, 21 Vt. 301; *Swift v. Harriman*, 30 Vt. 607; *Smith v. Foster*, 36 Vt. 705.

work for another a certain time, he can maintain an action for his compensation without making up time he has reasonably lost during the period, and the time so lost will be deducted.^(*)

§ 662. **Measure of recovery.**—But the party in default must not gain by his default, nor the other lose by it. Parties often agree to give excessive prices to have an entire contract literally performed, when a partial performance would never have been contracted for. And though the contract price, as far as practicable and equitable, furnishes the measure of damages on such a *quantum meruit*, and the defaulting party can in no case recover more, yet he can have his *quantum meruit* only, and is not entitled to the contract price for what is worth less.^(b) The mode of ascertaining the real benefit received from the part performance of work, in such case, is to estimate the whole work at the price fixed by the contract, and to deduct from that the amount requisite to complete the part of the work left unfinished. If any loss is occasioned by the unfinished part costing more in proportion than the whole was undertaken for, the loss must be borne by the party who originally contracted to do the whole. The amount to be allowed may in some cases be less than the proportion which the work done would bear to the cost of the whole, but cannot exceed it.^(c)

§ 663. **Recovery by an infant.**—In Vermont it has been held, in accordance with the rule in that State, that when an infant makes a contract with an adult to serve for a given time, and leaves before he has performed the whole

(*) McDonald v. Montague, 30 Vt. 357.

(b) Clement v. State Reform School, 84 Ill. 311; Allen v. McKibbin, 5 Mich. 449.

(c) McKinney v. Springer, 3 Ind. 59.

of the service, he is entitled to recover what his services are reasonably worth, taking into consideration the injury to the other.^(a) But in Maine it has been held that a minor who has agreed to work for a certain time, and not to leave without giving notice a certain time beforehand, but does not complete the agreed term, and does not give the notice, is not liable to have the damages thereby occasioned deducted from the amount he would otherwise recover, the minor not being bound by his contract.^(b)

(^a) *Hoxie v. Lincoln*, 25 Vt. 206; *acc. Moses v. Stevens*, 2 Pick. 332; *Gaffney v. Hayden*, 110 Mass. 137; *Hagerty v. Nashua Lock Co.*, 62 N. H. 576.

(^b) *Derocher v. Continental Mills*, 58 Me. 217.

CHAPTER XXI.

THE MEASURE OF DAMAGES IN ACTIONS ON CONTRACTS OF SERVICE.

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| § 664. Compensation for services performed. | § 669. Discharge of an attorney. |
| 665. Damages for wrongful discharge. | 670. Compensation payable on a contingency. |
| 666. Prospective damages recoverable. | 671. Compensation by a commission. |
| 667. General rule—Duty to seek employment. | 672. Compensation by percentage of an amount that can be fixed. |
| 668. Employment terminable on notice. | 673. Commissions on insurance renewals. |
| | 674. Commission from both parties. |
| | 675. Consequential damages. |

§ 664. Compensation for services performed.—We now turn to the claims of agents against their principals ; or of servants against their masters, for the contracts of agency and of service are nearly allied. We have already (*) considered the question how far the principal is liable to pay his servant or other agent, who is engaged for a specific time, and without sufficient reason quits the employment. If, however, the agent or servant fully performs his contract, but the contract allows him no definite compensation, he is allowed to recover on a *quantum meruit* the value of the services performed, (b) without regard to the amount of benefit which the princi-

(*) § 658.

(b) *Lockwood v. Onion*, 56 Ill. 506 ; *Stowe v. Buttrick*, 125 Mass. 449 ; *Erben v. Lorillard*, 2 Keyes, 567. The rule is the same where the contract is terminated by mutual consent before it is fully performed : *Ratcliff v. Baird*, 14 Tex. 43.

pal or master received from them.^(*) Similarly, if a minor enter the service of the defendant without permission of his father, the father may recover the reasonable value of his services, less the amount of compensation which the minor has received.^(*) If the contract fixes the compensation, that amount is the sole measure of damages.^(e)

In a case in Minnesota, where by the contract the defendant was to fix the amount of compensation, the court refused to give more than the amount fixed by the defendant.^(d) But in Illinois such a contract was held to be equivalent to a contract to pay a reasonable compensation, and the plaintiff was allowed to recover on a *quantum meruit*.^(e) And in the same State, when a plaintiff had presented a bill, it was held error to allow him to recover more than the amount of the bill.^(f)

Where the plaintiff began to perform the services under an express contract, and continued after the term named in the contract, he was held entitled to compensation at the contract rate.^(g) The plaintiff assumed, without authority, to act as agent for the defendant, and his acts were ratified by the defendant; he became entitled to the same compensation as if he had originally acted with authority.^(h) Where an attorney was engaged in Iowa to perform services in another State, it was held that his compensation should be at the rate paid in Iowa rather than at that paid in the other State.^(k)

(*) Stowe v. Buttrick, 125 Mass. 449; Bagley v. Bates, Wright (Oh.) 705

(*) Sherlock v. Kimmell, 75 Mo. 77; Huntoon v. Hazelton, 20 N. H. 388.

(*) Ludlow v. Dole, 62 N. Y. 617.

(d) Butler v. Winona M. Co., 28 Minn. 205.

(e) Van Arman v. Byington, 38 Ill. 443.

(f) Daniels v. Wilber, 60 Ill. 526.

(g) Huntingdon v. Claffin, 38 N. Y. 182; Ranck v. Albright, 36 Pa. 367.

(h) Wilson v. Dame, 58 N. H. 392.

(k) Stanberry v. Dickerson, 35 Ia. 493.

§ 665. **Damages for wrongful discharge.**—The question often arises to what extent the principal is liable when he discharges the agent without legal excuse. * In an English case¹ the plaintiff was employed as clerk, to do the business of shipping agent at Southampton, under a contract of hiring for two years, at £150 for the first year, £160 for the second year, and also 50 per cent. on the gross profits. The defendant, alleging disobedience of orders and misappropriation of money, discharged him. The jury found these issues against the defendant, and gave the plaintiff a verdict of twelve months' salary and twelve months' share of profits. One year's salary, within a trifling sum, appears to have been paid. A motion was made to set aside the verdict on the ground that the damages were excessive, but it was denied. Wilde, C. J., said: "With respect to the amount of damages, it was for the jury to say what amount of compensation the plaintiff was entitled to for the defendant's breach of contract." And Maule, J., said: "There is no ground for saying that the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff." The result at which the verdict arrived seems not open to observation. But the language of the court appears by no means equally free from objection. Why, in a case of this kind of simple contract, is it for the jury to fix without control the defendant's liability? and what has a charge of embezzlement, set up in the plea, to do with the quantum of damages? If in a case of this description there is no rule of damages, it would seem to be difficult to declare one in any; and if an unfounded defense is to have the effect of turning an action of contract into one of tort, and to give the uncontrolled discretion of the subject to the jury, the principles which

¹ *Smith v. Thompson*, 8 C. B. 44.

govern the measure of damages will in all cases be in great risk of being lost sight of. That there is a rule in cases of this kind seems not to be doubtful; and it is, that the plaintiff has a right to recover the stipulated wages for the full time, subject to the defendant's right to recoup whatever the plaintiff might during the period have reasonably earned.¹ **

The agent or servant who has been wrongfully discharged may in fact choose one of three courses.^(a) First, he may consider the contract as rescinded, and recover on a *quantum meruit* what his services were worth, deducting what he had received for the time during which he had worked.^(b) Second, he may wait until the end of the term, and then sue for the full amount, less any sum which the defendant may have a right to recoup.^(c) Third, he may sue at once for breach of the contract of employment. This is the course ordinarily pursued. Not all these courses, however, are open to the plaintiff in every jurisdiction. In many States he is not allowed to treat the contract as rescinded.^(d) And in some States he cannot wait until the end of the term and then recover the contract price, upon showing readiness to perform,

¹ In *Richardson v. Mellish*, 2 Bing. 229, where it was agreed between the plaintiff and the defendant that in case of a vacancy occurring in the command of a certain East India vessel the plaintiff should be appointed for two voyages, it was held that the jury

might give damages for what the plaintiff could have earned on both the voyages, and that they were not limited to one. Here, too, the jury would now be held *bound* to give their verdict for both the voyages, subject, of course, to the right to recoupment.

(a) *Rogers v. Parham*, 8 Ga. 190.

(b) *Fowler v. Armour*, 24 Ala. 194; *Clark v. Manchester*, 51 N. H. 594.

(c) *Strauss v. Meertief*, 64 Ala. 299. If the wages are payable in instalments, it has been held that he can recover such instalments only as are due at the date of the writ, not those also which fall due before the time of trial. *Hamlin v. Race*, 78 Ill. 422.

(d) Such is the tendency of modern decisions. The question is, however, one rather of the right of action than of damages, and will not be further discussed here.

but must bring suit upon the breach created by the discharge, and recover such damages only as are consequent upon that ; in other words, he is restricted to the third course.^(*) Where, at the time of the wrongful discharge, no services have been performed under the contract that have not been paid for, it has been held in several cases by the Court of Common Pleas for the city of New York, that no action can be maintained for *wages* under the contract, and that the servant's only remedy is an action for damages for breach of the contract, in which he recovers full and final satisfaction.^(b)

§ 666. Prospective damages recoverable.—The Supreme Court of Wisconsin, in a case where a clerk engaged at a salary of \$2,000 a year for five years was discharged without cause at the end of the first year, and brought his action without waiting for the end of the term, held that he could recover damages measured by the contract down to the day of the trial only, with such deductions as were proper on the principles already stated.^(c) But the authorities on this point are in conflict, and recent cases tend to maintain the doctrine that the plaintiff must recover in one action his entire damage; and that the measure of damages is, therefore, the amount of wages due at the time of trial, together with compensation for the future benefit the plaintiff would probably have realized under the contract, with the proper deductions.^(d) Thus in a case where the plaintiff had been injured while

(*) Cases cited, § 502, n. (b).

(b) *Moody v. Leverich*, 4 Daly 401 ; *Polk v. Daly*, 4 Daly 411.

(c) *Gordon v. Brewster*, 7 Wis. 355.

(d) *Hartland v. General Exch. Bank*, 14 L. T. Rep. 863 ; *Ricks v. Yates*, 5 Ind. 115 ; *Richardson v. Eagle M. Works*, 78 Ind. 422 ; *Ætna L. I. Co. v. Nexsen*, 84 Ind. 347 ; *Sutherland v. Wyer*, 67 Me. 64 ; *Everson v. Powers*, 89 N. Y. 527 ; *James v. Allen County*, 44 Oh. St. 226 ; *East Tennessee, V. & G. R.R. Co. v. Staub*, 7 Lea 397 ; *Litchenstein v. Brooks*, 75 Tex. 196.

in the defendant's employ, and the defendant contracted to continue to employ him while his disability continued, it was held that upon his discharge without cause the plaintiff might sue for the entire damage he had suffered by the discharge, not merely for the wages that were due at the time of trial.^(a)

§ 667. **General rule—Duty to seek employment.**—In an action brought by an agent or servant for breach of the contract of employment by his wrongful discharge, the measure of damages is the actual loss inflicted by the discharge.^(b) It is the plaintiff's duty to use reasonable efforts to avoid loss by securing employment elsewhere.^(c) The measure of damages is, therefore, the amount of wages he would have earned under the contract, deducting, however, such sums as he earned or by reasonable diligence might have earned elsewhere,^(d) and making allowance for the expenses of obtaining employment.^(e) The burden of proof is on the defendant to show that the plaintiff might have obtained other em-

(a) *East Tenn., Va. & Ga. R.R. Co. v. Staub*, 7 Lea 397.

(b) *Goodman v. Pocock*, 15 Q. B. 576; *Emerson v. Howland*, 1 Mason 45; *Whitaker v. Sandifer*, 1 Duv. 261; *Meade v. Rutledge*, 11 Tex. 44.

(c) *Wright v. Falkner*, 37 Ala. 274; *Ream v. Watkins*, 27 Mo. 516; *Polk v. Daly*, 4 Daly 411; *contra*, *Stewart v. Walker*, 14 Pa. 293 (*semble*), is not to be supported.

(d) *Foye v. Dabney*, 1 Sprague, 212; *Saxonia M. Co. v. Cook*, 7 Col. 569; *Ansley v. Jordan*, 61 Ga. 482; *Roberts v. Crowley*, 81 Ga. 429; *Brown v. Board of Education*, 29 Ill. App. 572; *Hinchcliffe v. Koontz*, 121 Ind. 422; *Beymer v. McBride*, 37 Ia. 114; *Sutherland v. Wyer*, 67 Me. 64; *Cumberland & P. R.R. Co. v. Slack*, 45 Md. 161; *Dickinson v. Talmage*, 138 Mass. 249; *Harrington v. Gies*, 45 Mich. 374; *Champlain v. Detroit Stamping Co.*, 68 Mich. 238; *Prichard v. Martin*, 27 Miss. 305; *Squire v. Wright*, 1 Mo. App. 172; *Everson v. Powers*, 89 N. Y. 527; *Gillis v. Space*, 63 Barb. 177; *De Leon v. Echeverria*, 45 N. Y. Super. Ct. 610; *Heim v. Wolf*, 1 E. D. Smith 70; *Thompson v. Wood*, 1 Hilt. 93; *Huntington v. Ogdensburgh & L. C. R.R. Co.*, 33 How. Pr. 416; *Kirk v. Hartman*, 63 Pa. 97; *Willoughby v. Thomas*, 24 Gratt. 521; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630.

(e) *Dickinson v. Talmage*, 138 Mass. 249.

ployment ; for the failure of the plaintiff to obtain other employment does not affect the right of action, but only goes in reduction of damages, and if nothing else is shown, the plaintiff is entitled to recover the contract price upon proving the defendant's violation of the contract, and his own willingness to perform.^(*) The fact that the plaintiff obtained new employment does not constitute a defense. It is one of the facts for the jury to consider in estimating the plaintiff's loss ;^(b) and to entitle the defendant to reduce the recovery on the ground that the plaintiff had earned money in another employment, it must also be shown that if he had not been discharged, he could not have earned it without violating his duty under his contract.^(c) Of course, if the plaintiff, at request of the defendant, held himself in readiness to go to work again after his discharge, he may recover the full amount of wages.^(d)

Where the plaintiff immediately after his wrongful discharge obtained another employment at a higher salary, it was held that he could recover only nominal damages.^(e) And an offer by the defendant to take the plaintiff back into his employ may be shown in reduction of damages, if there was nothing that should have prevented the plaintiff from accepting the offer.^(f) Thus in *Beymer v. McBride*,^(g) the defendant had agreed to

(*) *Strauss v. Meertief*, 64 Ala. 299 ; *Saxonia M. Co. v. Cook*, 7 Col. 569 ; *Ansley v. Jordan*, 61 Ga. 482 ; *Roberts v. Crowley*, 81 Ga. 429 ; *Brown v. Board of Education*, 29 Ill. App. 572 ; *Gazette P. Co. v. Morss*, 60 Ind. 153 ; *Hinchcliffe v. Koontz*, 121 Ind. 422 ; *Horn v. Western Land Assoc.*, 22 Minn. 233 ; *Pond v. Wyman*, 15 Mo. 175 ; *King v. Steiren*, 44 Pa. 99 ; *Barker v. Knickerbocker Ins. Co.*, 24 Wis. 630.

(b) *Williams v. Chicago Coal Co.*, 60 Ill. 149.

(c) *Jaffray v. King*, 34 Md. 217.

(d) *Bromley v. School Dist. No. 5*, 47 Vt. 381.

(e) *Williams v. Anderson*, 9 Minn. 50.

(f) *Birdsong v. Ellis*, 62 Miss. 418 ; *Squire v. Wright*, 1 Mo. App. 172.

(g) 37 Ia. 114.

make the plaintiff agent for the sale of certain machines for which he was agent, and to turn over to him all the orders already given and the machines required to fulfil the orders. On his failure to keep the agreement, it was held proper to show that two days after the breach the owners of the machines offered to turn the orders and machines over to the plaintiff, and that the plaintiff had refused to accept; for the plaintiff was bound to use ordinary efforts to make the damages as light as possible.

Where the plaintiff, after seeking other employment without success, does work for himself, it has been held in Michigan that the value of such work need not be deducted; (*) but in New York where he went to work on his own account, the value of his work was deducted from the amount he recovered. (b) In all such cases the question would seem to be: was his work on his own account incompatible with the performance of the original service? Where the plaintiff was employed as long as he should choose to stay in the defendant's employ it was held that upon discharge he could recover only nominal damages, because the period of employment was uncertain. (c)

§ 668. **Employment terminable on notice.**—A servant is often employed on a contract terminable by notice within a certain time, or at once by paying wages for that time. Such are the contracts of domestic servants, terminable by a month's warning or a month's wages. In such a case the month's wages is in the nature of stipulated damages; (d) it may be recovered upon discharge without warning. (e)

(a) *Harrington v. Gies*, 45 Mich. 374.

(b) *Huntington v. Ogdensburgh & L. C. R.R. Co.*, 33 How. Pr. 416.

(c) *Bolles v. Sachs*, 37 Minn. 315.

(d) *Fewings v. Tisdal*, 1 Ex. 295.

(e) *East Anglian Ry. Co. v. Lythgoe*, 10 C. B. 726; *Robinson v. Hindman*, 3 Esp. 235; *Gordon v. Potter*, 1 F. & F. 644.

In a few cases where a domestic servant or a farm-hand was hired, usually for a month or other short time, the servant, upon a wrongful discharge, has been allowed to recover wages for the whole period, nothing being said about employment elsewhere.^(a) The courts may have looked upon these cases as analogous to those last cited; or may simply have neglected to speak of other employment because no such point was made by the defendant. Whatever the ground on which they proceeded, they are not to be regarded as opposed to the general rule.

§ 669. *Discharge of an attorney.*—Where an attorney is discharged during the time for which he is employed, a peculiar question arises, owing to the nature of the relation existing between an attorney and client. Thus where an attorney is retained by a client, and is wrongfully discharged from the trust, it is usually held that owing to the confidential relation between the parties, and the impropriety of the attorney accepting other employment in the cause, he may recover the full amount of the compensation agreed upon, less such expenses as would have been incurred by him in carrying out the agreement.^(b) No other measure of damages is usually possible, as the Supreme Court of California points out.^(c) And when the plaintiff, an attorney, was to have an agreed amount upon obtaining the pardon of a convict, and the pardon was obtained, though after the

(^a) *Callo v. Brouncker*, 4 C. & P. 518; *Davis v. Ayres*, 9 Ala. 292; *Martin v. Everett*, 11 Ala. 375; *Webster v. Wade*, 19 Cal. 291; *Decker v. Hassel*, 26 How. Pr. 528; *Cox v. Adams*, 1 N. & McCord 284; *Dunn v. Hereford*, 1 Wyo. 206.

(^b) *Hunt v. Test*, 8 Ala. 713; *Brodie v. Watkins*, 33 Ark. 545; *Myers v. Crockett*, 14 Tex. 257.

(^c) *Baldwin v. Bennett*, 4 Cal. 392; *Webb v. Trescony*, 76 Cal. 621; *Bartlett v. Odd Fellows' S. Bank*, 79 Cal. 218.

wrongful discharge of the plaintiff from the employment, he was held entitled to the agreed amount.^(*) But circumstances may limit the rule. Thus in the case of *Horn v. Western Land Association*,^(b) it was held that though the contract price could not be reduced by the ordinary earnings of the attorney, yet if the defendant could show affirmatively that the attorney obtained "other employment and compensation inconsistent with his engagement under the contract," such compensation would be deducted from the amount recovered.

§ 670. *Compensation payable on a contingency.*—The compensation of a servant or agent often depends upon a contingency. In such a case, where a breach of the contract by the employer prevents the happening of the contingency he will not be allowed by taking advantage of his own breach of contract to prevent the plaintiff from recovering compensation altogether. If in such a case the amount of compensation can be determined, the plaintiff will be allowed to recover it, though, through the defendant's default, the contingency upon which it was payable has not happened. Thus, where the plaintiff was to receive £20 at Lady Day, if he stayed till then, and the defendant wrongfully discharged him before Lady Day, he was allowed to recover the £20.^(c) Where a broker secures a proper purchaser for his principal, he is entitled to his commission, though the principal refuses to sell,^(d) or through defect of title cannot convey.^(e) And where the broker was to have all he could get for the land over \$200, it was held that he could recover what a proper

(*) *Moyer v. Cantieny*, 41 Minn. 242.

(b) 22 Minn. 233.

(c) *Lake v. Campbell*, 5 L. T. Rep. 582.

(d) *Prickett v. Badger*, 1 C. B. (N. S.) 296; *Durkee v. Gunn*, 41 Kas. 496; *Moses v. Bierling*, 31 N. Y. 462.

(e) *Doty v. Miller*, 43 Barb. 529.

purchaser, secured by him, was willing to pay over \$200, though the owner refused to sell.^(*) In *Fairchild v. Rogers* ^(*) it was held that the agreed commission could be recovered upon breach by the owner on proof that the price named would certainly have been obtained, though the broker did not actually secure a customer.

Where the amount of compensation, which would be due under the contract, cannot be determined, the plaintiff may recover the value of his services. Thus, where the plaintiff was engaged by the defendant to train, enter in races and ride the defendant's horse in races for a year, his compensation to be two-thirds of the net profits, and the defendant broke the contract, the defendant claimed that the measure of damages was two-thirds of the value of the use of the horse for a year. The court, however, allowed the plaintiff to recover the value of his services, on the ground that the defendant had put it entirely out of the plaintiff's power to secure remuneration at the contract rate.^(°)

§ 671. Compensation by a commission.—Where the agent is to be paid, in part, by a commission, he can in general recover no damages on account of possible future commissions.^(*) Thus, where the plaintiff was selling agent for the defendant, and was to receive a salary and a commission on all goods he sold over the amount of \$30,000, it was held that, having been wrongfully discharged before his time of service had expired, and before he had sold goods to the value of \$30,000, he could recover only the amount of his salary.^(°) In *Washburn v. Hub-*

^(*) *Heyn v. Philips*, 37 Cal. 529.

^(°) 32 Minn. 269.

^(*) *Barr v. Van Duyn*, 45 Ia. 228.

^(*) *Brigham v. Carlisle*, 78 Ala. 243; *Beck v. West*, 87 Ala. 213.

^(°) *Stern v. Rosenheim*, 67 Md. 503; *acc. Union Refining Co. v. Barton*, 77 Ala. 148; *Brigham v. Carlisle*, 78 Ala. 243.

bard,^(*) the plaintiff sued defendant for breach of a contract making the plaintiff the defendant's general agent for the sale of car springs. It was held that evidence by the plaintiff of the amount of the profits which might have been made during the term of the agreement, based on the probable amount of sales, was inadmissible.

In a case often cited,^(b) the plaintiff had engaged the defendant to act as agent in the sale of sewing machines. The defendant was to hire a room and team and sell all the machines he could within a certain time. The plaintiff was to supply machines at 25 per cent. below the retail price. For eight months the defendant made almost constant application for machines. Some were supplied, but not enough to meet the demand. The defendant set up these facts as an offset to a claim of the plaintiff. It was held that the defendant could recover the value of the time he was obliged to be idle, and reasonable expenditures, but that the profits were too speculative. The court said :

"We would not be understood as holding that where a person is employed to sell goods on commission, and the employer fails to furnish the goods, the person employed may not recover for loss of profits which he might have made if the goods had been furnished. If the quantity to be furnished was a definite amount and the demand was practically unlimited, possibly he might be allowed to recover for loss of profits. But where a person employs another to sell on commission all the goods he can within a limited territory, especially if the goods are of that kind of which there is no regular consumption or demand, the case is quite different. The number of sewing machines of a particular kind which can be sold within a given county and within a given time is very uncertain. Few cases can be found where profits have been disallowed as speculative, in which the uncertainty is greater."

(*) 6 Lans. 11.

(b) *Howe S. M. Co. v. Bryson*, 44 Ia. 159, 163.

The defendant is not, of course, exempted from making compensation because payment according to the contract was to be by a commission which he has made it impossible for the plaintiff to earn. The true measure of damages in such a case should be the value of the services the plaintiff had performed. In *Gifford v. Waters* (*) the plaintiff was to receive a proportion of the profits of a business, and was entitled to draw a certain amount each week. It was held that this sum, being a reasonable compensation, might be recovered.

A few cases which allow the plaintiff to recover the amount of commissions he would probably have earned cannot be supported. (b) In a case in Maryland, (c) the plaintiff was to receive \$1,000 a year and 2 per cent. commissions on sales above \$40,000 a year; and the contract was terminable upon one month's notice. The contract was terminated by the defendant at the end of six months, when the plaintiff had sold goods to the amount of between \$30,000 and \$40,000. It was held that, in addition to his salary, the plaintiff might recover his commission on all sales above \$20,000. The court relied on the fact that the contract was not broken, but was put an end to by its own terms. The case would hardly be followed.

§ 672. Compensation by percentage of an amount that can be fixed.—Where the agent or servant is paid by a percentage of a sum the amount of which did not depend upon his services, and can therefore be fixed notwithstanding his discharge, he is entitled to recover the agreed compensation though he was discharged before complet-

(*) 67 N. Y. 80.

(b) *Life Association of America v. Ferrill*, 60 Ga. 414; *Alfaro v. Davidson* 40 N. Y. Super. Ct. 87.

(c) *Jenkins v. Long*, 8 Md. 132.

ing the work he was to do. Thus where the agent was to receive a commission on all sales made by the principal, whether through his agency or not, it was held that he might recover the amount of his commissions on sales made after his discharge, but during the time for which he was employed.^(a) Where the agent was to have a certain commission for superintending the repairs on a vessel, and for advancing the expense, and the principal broke the contract, the agent, having been ready to superintend the repairs and to furnish the money required, was allowed to recover commissions at the rate fixed in the contract.^(b)

Where the plaintiff was hired for a year as overseer of the defendant, and was to receive a proportion of the crop, he was allowed, upon being wrongfully discharged just before harvest, to recover the agreed proportion of the matured crop.^(c) In accordance with this principle, where the plaintiff, an attorney employed to prosecute a claim for a percentage of the amount recovered, was wrongfully discharged, it was held that as the claim proved to be an unfounded one he could recover only nominal damages.^(d)

§ 673. **Commissions on insurance renewals.**—Commissions of an insurance agent for renewals are held to be capable of accurate measurement, and probable commissions of this nature may therefore be included in the agent's damages.^(e) In *Lewis v. Atlas Mut. Life Ins.*

(a) *Blair v. Laffin*, 127 Mass. 518.

(b) *Mauran v. Warren*, 2 Lowell 53.

(c) *Clancey v. Robertson*, 2 Mills (S. C.) 404. But when the discharge was at an earlier stage of the crop, an allowance of the agreed proportion of a *probable average crop* is questionable. Such an allowance was made in *Hassell v. Nutt*, 14 Tex. 260.

(d) *Swinerton v. Monterey Co.*, 76 Cal. 113.

(e) *Ætna Life Insurance Co. v. Nexsen*, 84 Ind. 347, *acc.*

Co.,^(*) the plaintiff was the agent of the defendant under a contract to last five years. He was to be paid a percentage on first premiums, term insurance, paid-up policies, and renewals. The defendant wound up its business before the five years expired. *Held*, that as the value of the renewals was a sum proximately ascertainable by the calculations of actuaries, this was a proper mode of estimating his damages. But the average amount of his commissions previously earned monthly on first premiums was, without some other proof of the probable amount of business, of too speculative a character.

§ 74. Commission from both parties.—An agent cannot retain a commission from a party with whom he is employed to deal without the express consent of his principal; and if he receives such a commission, it must be deducted from the amount of the compensation to be paid by his principal.^(*) This is an application of the general principle that all gains through breach of fiduciary relation become the property of the beneficiary.

§ 675. Consequential damages.—Where the mate of a vessel was unlawfully wounded by the master in a foreign port during a voyage for which he had shipped, and was in consequence taken on shore, detained there, and subjected to medical treatment, it was held in an action against the owners for the breach of the shipping articles that his compensation for lost time was not restricted to the period of the contract. He was entitled to damages equivalent to the injury, which included wages for such reasonable time as was lost by his detention, and till he could return home, besides the medical and other expenses necessitated by the wound.^(*)

^(*) 61 Mo. 534.

^(*) Maura v. Warren, 2 Lowell 53.

^(*) Croucher v. Oakman, 3 All. 185.

In an English case, the plaintiff shipped as a seaman at a certain monthly rate of wages for a commercial voyage, not to exceed twelve months, to Rio and elsewhere, and to end by his being brought back to some port in the United Kingdom, or on the continent of Europe between Elbe and Brest. On arriving at Rio the defendant proposed to employ his vessel as a ship of war in the service of the Peruvian government. The plaintiff thereupon refused to proceed any further with the voyage, on the ground that it was illegal, and exposed him to risks not contemplated by his contract, left the ship and went on shore. There he was arrested by the Peruvian authorities as a deserter and committed to prison, where he remained some days. On coming out he found that the ship had sailed, taking his clothes and other articles which he had left on board. In an action for damages for the breach of contract the jury found a verdict for the plaintiff, and assessed the damages for the breach under three heads, namely: First, £12 10s. for loss of wages under the contract; second, £20 for loss of clothes; third, £30 for general damages for the imprisonment and otherwise by reason of the defendant's breach. *Held*, that the damages under the second and third heads were too remote.^(*)

It was held in Missouri, in a case not very fully reported,^(b) where a hand employed on board a steamboat at a stipulated rate of wages for a trip, was discharged and put off the boat without cause before the end of the trip, and the boat, owing to an accident to

(*) *Burton v. Pinkerton*, L. R. 2 Ex. 340. But see *Hunt v. Colburn*, 1 Sprague 215. In that case, where the facts were similar, it was held that the plaintiff might recover for the loss of clothes carried off in the vessel; and being detained by sickness in the foreign port, he was also allowed wages during the time of his detention and passage-money home.

(b) *Cunningham v. Steamboat Low Water*, 28 Mo. 338.

her machinery, was detained for some days beyond the regular period of her trips, that he could recover wages only for the time usually consumed in a trip, and not for that of the additional detention. This decision seems to admit of question, and not to be fully borne out by the case of the *Elizabeth*,^(*) which is referred to as authority for it. That case decided that when a ship bound to St. Petersburg from Portsmouth and back had met with an accident, the repairs necessitated by which detained her in a northern port where she would have been blocked up by the ice and detained all the winter, the master had a right to discharge his crew, on condition of paying their passage back to England and wages up to the time of such return. This was a reasonable and justifiable course, and furnished the crew with a full and fair indemnity, which in the other case the boat hand failed to receive. To bring the latter case within the authority or analogy of the former, the hand should have been brought or sent back to the place where he was shipped, or indemnified for the expense of getting there, and have received wages for the time required for his return.

In an action by a domestic servant for wages, evidence was given tending to show that the plaintiff had been dismissed from the defendant's residence in the country between eleven and twelve o'clock at night, and was left all night in the space between the hall door and the outer gate. The plaint contained a count for wrongful dismissal, with an averment of special damage. The jury, under this count, found for the plaintiff, with £20 damages, ten shillings of which only were for wages due, and £19 10s. were for the injury suffered by the plaintiff from the circumstances of the dismissal. The defendant

(*) 2 Dods. Adm. 403.

having moved to reduce the verdict to ten shillings, the court granted the motion, holding that under the pleadings the plaintiff was entitled only to the wages due her by the contract of hire, and "could not recover as special damage in respect of any matters save such as would not have happened to her had the contract been fulfilled by payment of those moneys at the time of her dismissal." Mr. Baron Deasy, however, inquired of the plaintiff's counsel whether they could not frame a count upon the implied duty of a master to his servant that would meet such a case.^(a) Where a servant is wrongfully discharged, he may recover the expense of obtaining a new employment.^(b) And an auctioneer may recover money paid for advertising and for his tax^(c) and the expense of cataloguing the goods if his commission is revoked before the sale.^(d)

^(a) *Breen v. Cooper*, Ir. R. 3 C. L. 621.

^(b) *Dickinson v. Talmage*, 138 Mass. 249.

^(c) *Russell v. Miner*, 25 Hun 114.

^(d) *Carpenter v. Le Count*, 22 Hun 106.

CHAPTER XXII.

THE MEASURE OF DAMAGES IN ACTIONS UPON BONDS.

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| § 676. Penalty and liquidated damages. | § 685. Injunction bonds. |
| 677. Damages in excess of penalty. | 686. Bail bonds. |
| 678. Interest on penalty. | 687. Arbitration bonds. |
| 679. Bonds containing express covenants. | 688. Appeal bonds. |
| 680. Statutory bonds and undertakings. | 689. Replevin bonds. |
| 681. Reduction of damages. | 690. Value of property when to be estimated. |
| 682. Attachment bonds. | 691. Destruction of property before payment. |
| 683. Rule in Alabama and Tennessee. | 692. Official bonds. |
| 684. Bonds to dissolve attachment. | 693. Actions against sureties. |
| | 694. Miscellaneous bonds. |

§ 676. **Penalty and liquidated damages.**—We have already discussed the general nature of actions on bonds, and the distinction between the rules governing agreements enforced through a penalty, and such as provide for liquidated damages. It remains to consider some questions relating exclusively to actions on bonds.

§ 677. **Damages in excess of penalty.**—* The question has been much agitated as to damages in gross, and also as to interest, and both as against a principal and against a surety.** It is fully settled, however, that in an action on a bond no damages in gross can be recovered, against either principal or surety, beyond the penalty.(*) Thus where a railroad company executed a bond to nine per-

(*) Bank of U. S. v. Magill, 1 Paine 661; Freeman v. The People, 54 Ill. 153; Sweet v. Steele, 10 Ia. 374; Fraser v. Little, 13 Mich. 195; Farrar v. Christy, 24 Mo. 453; State v. Sandusky, 46 Mo. 377.

sons, according to their relative and respective several interests, in the penal sum of \$3,000, as follows: "On this express condition that the said railroad company shall, on the assessment of damages to be made to secure right of way for said railroad, pay the obligees relatively and respectively, damages which may be assessed as aforesaid, then this bond to be void," which was a several instrument, on which each obligee might sue, it was held that no one could recover more than his *pro rata* share of the penalty. If the damages assessed in favor of all exceeded the penalty, each obligee could recover only his share of it.^(*)

§ 678. Interest on penalty.—But there has been more doubt on the question of recovery of interest on the penalty. At one time the American rule to be deduced from all the cases seemed to be, that against a surety in *debt on bond*, nothing could be recovered beyond the penalty;¹ that against the principal in that form of action, interest might be recovered beyond the penalty. While in England the penalty in all cases, except perhaps in equity, was the absolute limit.²

¹ Clark v. Bush, 3 Cowen, 151; Rayner v. Clark, 7 Barb. 581.

² Lowe v. Peers, 4 Burr. 2225, which was covenant on a sealed contract not to marry; Winter v. Trimmer, 1 W. Bl. 395; Bird v. Randall, 1 W. Bl. 371 and 387; 3 Burr. 1345; Brangwin v. Perrot, 2 W. Bl. 1190, on an indemnity bond against the maintenance of a bastard; Knight v. Maclean, 3 Br. Ch. 496; Tew v. Earl of Winterton, 3 Br. Ch. 490; White v. Sealy, Doug. 49, on a bond conditioned for the payment of rent; Lonsdale v. Church, 2 T. R. 388, overruled by Wilde v. Clarkson, 6 T. R. 303, and M'Clure v. Dunkin, 1 East 436; Harrison v. Wright, 13 East 343; Hefford v. Alger, 1 Taunt. 218; Evans v. Brander, 2 H. B. 547; Paul v. Goodluck, 2 Bing. N. C. 220; Hellen v. Ard-

ley, 3 C. & P. 12. In Hellen v. Ardley, it was held at Nisi Prius, that in debt on bond for payment of money with interest, the plaintiff could only recover to the amount of the penalty, with one shilling for detention of the debt. Buller's N. P. 178. And in America, Tunison v. Cramer, 5 N. J. L. 498; Graham v. Bickham, 4 Dall. 149; s. c. 2 Yeates 32; Harris v. Clap, 1 Mass. 308; Payne v. Ellzey, 2 Wash. (Va.) 143; United States v. Arnold, 1 Gall. 348, 360; s. c. 9 Cranch 104; Perkins v. Lyman, 11 Mass. 76; Smedes v. Hooghtaling, 3 Caines 48; Fairlie v. Lawson, 5 Cowen 424; Clark v. Bush, 3 Cowen 151; Cook v. Tousey, 3 Wend. 444. In Bank of United States v. Magill, Paine, 661, 669, in an action of debt on bond in the penalty of \$50,000

(*) St. Louis, A. & R. I. R.R. Co. v. Coultas, 33 Ill. 188.

The authorities are, however, by no means in agreement. The better opinion is, that interest may be recovered, in addition to the penalty, in an action whether against the principal^(*) or the surety.^(b) In *Lyon v. Clark*,^(c) it is pointed out, in the very clear opinion of Comstock, J., that there is a distinction between the question whether, at the time of the default, the liability can exceed the penalty, and the question whether, after de-

given by Magill, and two sureties, conditioned for the faithful discharge of Magill's duties as cashier, Thompson, J., said: "I am inclined to adopt as the better opinion, that where a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, yet the recovery must be limited to the penalty. I the more readily adopt this rule in the present instance, because it is a case of sureties. In such cases, it is peculiarly fit and proper that they should not be made liable for damages beyond the penalty. If the responsibility was without limitation, prudent and discreet men would be unwilling to become security and expose themselves to such hazard. No judgment could be formed as to the extent of the risk, nor any calculation made as to the indemnity, or counter security necessary for their protection. I do not mean to be understood as ex-

tending this rule to bonds where the condition is for the payment of money only. Such cases might, probably, require the application of a different rule, and depend on different principles." In the *United States v. Arnold*, 1 Gall. 348, 360, Story, J., said: "Notwithstanding some contrariety in the books, I think the true principle, supported by the better authorities, is that the court cannot go beyond the penalty and interest thereon, from the time it becomes due by the breach."

In a case in the Queen's Bench it was said, that a replevin bond is no exception to the general rule, that on a bond the plaintiff cannot recover beyond the penalty and costs of suit. *Branscombe v. Scarbrough*, 6 Q. B. 13. In a case in Pennsylvania, the subject was examined, and it was held that a surety in a replevin bond is not liable beyond the penalty. *Balsley v. Hoffman*, 13 Pa. 603.

(*) *Francis v. Wilson*, Ry. & Moo. 105; *Ives v. Merchants' Bank*, 12 How. 159; *Tyson v. Sanderson*, 45 Ala. 364; *Crane v. Andrews*, 10 Col. 265; *Carter v. Carter*, 4 Day 30; *Moss v. Wood*, R. M. Charlton 42; *Carter v. Thorn*, 18 B. Mon. 613; *Pitts v. Tilden*, 2 Mass. 118; *Warner v. Thurlo*, 15 Mass. 154; *Robbins v. Long*, 16 N. J. Eq. 59; *Brainard v. Jones*, 18 N. Y. 35; *Perit v. Wallis*, 2 Dall. 252; *Tennant v. Gray*, 5 Munf. 494; *Tazewell v. Saunders*, 13 Gratt. 354; *Perry v. Horn*, 22 W. Va. 381. *Contra*, *Rubon v. Stephan*, 25 Miss. 253; *State v. Sandusky*, 46 Mo. 377; *Turner v. Lord*, 92 Mo. 113; *State v. Estes*, 101 N. C. 541; *Cherry v. Mann*, Cooke (Tenn.) 268; *State v. Blakemore*, 7 Heisk. 638.

(b) *Crane v. Andrews*, 10 Col. 265; *Burchfield v. Haffey*, 34 Kas. 42; *Wyman v. Robinson*, 73 Me. 384; *Lyon v. Clark*, 8 N. Y. 148; *Brainard v. Jones*, 18 N. Y. 35.

(c) 8 N. Y. 148.

fault, interest can be allowed in excess of the penalty. The first is a question of the effect of the contract; the second is one of compensation for a breach of the contract. This distinction appears to be perfectly sound, and upon the whole there seems no reason why interest on the penalty should not be allowed.

§ 679. **Bonds containing express covenants.**—In certain bonds, the party affirmatively stipulating to do or to refrain from doing some particular act, proceeds to secure his agreement by a penalty, and in such cases the plaintiff at common law had his election whether to sue in debt or in covenant. There is a clear distinction between such a bond and the common bond, which merely stipulates for the payment of a sum of money, and makes its payment depend on a condition; for the performance of that condition there is no promise, unless one can be implied from the joint effect of the condition and penalty.

Where a common-law action of covenant could be brought upon a bond, the measure of damages would be compensation, irrespective of the penalty, and even beyond it.¹ "There is a difference between covenants in general and covenants *secured* by a penalty or forfeiture. In the latter case, the obligee has his election; he may either bring an action of debt and recover the penalty, after which recovery of the penalty he cannot resort to the covenant; or, if he does not choose to go for the penalty, he can proceed upon the covenant, and recover more or less than the penalty, *toties quoties*."² The

¹ *Martin v. Taylor*, 1 Wash. C. C. 1. So Lord C. J. Tenterden, in his treatise on Shipping, assumes that as to charter-parties, damages may be recovered beyond the amount of the penalty and costs. *Abbott on Shipping*,

part iv, ch. ii, of the ship-owner's lien for profits, etc.

² Lord Mansfield in *Lowe v. Peers*, 4 Burr. 2225. See, also, *Bird v. Randall*, 1 W. Bl. 373, 387; *Winter v. Trimmer*, 1 W. Bl. 395; *Harrison v. Wright*, 13 East 343.

same principle was laid down in Pennsylvania,¹ where the defendant had agreed to pay \$22,318.49 for certain stock, and bound himself for the performance of the agreement in the sum of \$1,000; here it was held that this was not stipulated damages, but a penalty merely: and the plaintiff recovered damages beyond the penalty. "The plaintiff," said the court, "is entitled, notwithstanding the penalty, to recover damages commensurate with the injury suffered by a non-performance." So again in New York, in a case on a building agreement,² it was said: "As the articles contained a penalty and an express covenant by the defendant to pay the instalment for which the action was brought, the plaintiffs could, at their election, sue for either."³

But the question still remains: * does an ordinary bond imply an agreement to do the thing, on condition of the performance of which the penalty is to become void; and can an action of covenant be brought on it? This is an embarrassing and vexed question. Mr. Chitty says: "It seems that covenant lies on a bond, for it proves an agreement." It is doubtful what is the purport of this language. A bond undoubtedly proves an agreement; but is the agreement proved, the one stated in the penalty—to pay the money for which the obligee declares himself bound—or in the condition? The

¹ *Graham v. Bickham*, 4 Dall. 149.

² *Haggart v. Morgan*, 5 N. Y. 422.

³ *Chitty on Pleading*, vol. i, p. 132.

⁴ Mr. Chitty cites several cases: *Hill v. Carr*, 1 Ch. Cas. 294; *Holles v. Carr*, 3 Swanst. 649, which is in fact the same; *Norrice's Case*, Hardr. 178, and *Com. Dig. Covenant, A. 2*. The two first cases (in fact one) contain the *obiter dictum*, that "*covenant lies upon a bond*." The third was covenant on a covenant proper, the word *oblige* only being used instead of the usual phrase; and Lord C. B. Comyns, with his usual

precision, says: "Covenant lies, *if an agreement appear*, in an obligation." This is unquestionably true—"if the agreement appear." But in the condition of a bond to do or refrain from doing any particular act secured by a given penalty, does any agreement appear, absolutely to do the act or to respond in indefinite damages? Practically, we well know that it is not so understood; the obligor always considers the penalty as limiting the extent of his obligation.

(*) *Acc. Noyes v. Phillips*, 60 N. Y. 408; *Richards v. Edick*, 17 Barb. 260.

matter is of importance, and it seems impossible, on any just construction of the instrument, to imply from the condition an absolute agreement. This is not the proper place for a more elaborate discussion of the matter, but it could not with propriety be altogether overlooked.** In New York the Supreme Court has clearly intimated an opinion that an action of covenant will lie on a bond to enforce the condition ;¹ and in *Beale v. Hayes* (*) Duer, J., used the following language :

“ As all distinctions resulting merely from the form of the action, are now abolished, it appears to be a necessary consequence that, as a general rule, every action for the breach of an executory contract, whether the agreement contains a penalty or not, must be considered as an action for damages, in which the amount of the recovery will be limited only by the proof, and by the sum for which judgment is demanded in the complaint. The only exception will be, when, from the nature of the contract and the terms in which it is expressed, damages, as liquidated by the parties, may be justly treated, not as a penalty, but as a contingent debt, for this is a distinction in law which the Code has not abolished nor affected. It is true, that upon this construction, the insertion of a penalty in an agreement is a useless form, but this is no alteration of the law, since, for more than a century past, such has been its real character.”

Notwithstanding these remarks, the practice of recovering damages beyond the penalty of a money bond is unknown, a condition of things which could hardly exist if covenant would lie on such an agreement.

¹ *Clark v. Bush*, 3 Cowen, 151. In *Martin v. Taylor* (1 Wash. C. C. 1), in an action of covenant on an agreement secured by a penalty, Washington, J., said, that, “ where there is a penalty in an agreement under seal, the party injured may at common law sue for the whole penalty, and must be satisfied with it ; or he may bring covenant, and recover in damages more or less than the penalty.” It is to be re-

marked here that the agreement contained an express covenant to do the act for the non-performance of which the action was brought. The case, therefore, decides nothing as to the main point, whether covenant can be brought on a bond upon an agreement contained in the condition, and whether in such suit damages can be assessed beyond the penalty.

(*) 5 Sandf. 640.

§ 680. **Statutory bonds and undertakings.**—In suits on statutory undertakings and bonds given to secure a defendant against damages and costs resulting from an attachment, injunction, or other provisional remedy wrongfully issued or applied, the measure of damages is substantially indicated by the terms of the instrument as authorized by the statute. The cases turn chiefly on the interpretation of particular words, and the construction of particular statutes; some of the general principles, however, may with advantage be stated here. It should be observed that these relate strictly to actions on bonds. The measure of damages in actions of which the gist is the misuse of legal process, or trespass to the person, actions to which resort may often be had in addition to the remedy by debt on bond, is determined by wholly different considerations.^(*)

In suits on the bond or undertaking, the plaintiff recovers the actual expense and loss occasioned by the order, excluding remote or conjectural damages.^(b) The costs of the original proceeding may always be recovered,^(c) and a reasonable counsel fee for setting aside an injunction or attachment is usually allowed.^(d) In all actions upon statutory bonds the penalty fixed in the bond is the absolute limit of the damages, except that, as shown above, the plaintiff might, in a proper case recover interest.^(e)

(*) *Pettit v. Mercer*, 8 B. Mon. 51; *State v. Thomas*, 19 Mo. 613.

(b) *Higgins v. Mansfield*, 62 Ala. 267; *Drake v. Webb*, 63 Ala. 596; *Silsbee v. Lucas*, 53 Ill. 479; *Bennett v. Brown*, 20 N. Y. 99; *Campbell v. Tarbell*, 55 Vt. 455.

(c) *Hayden v. Sample*, 10 Mo. 215; *Schuyler v. Sylvester*, 28 N. J. L. 487; *Dunning v. Humphrey*, 24 Wend. 31.

(d) § 237.

(e) *Windham v. Coats*, 8 Ala. 285; *Seamans v. White*, 8 Ala. 656; *Perry v. Denson*, 1 Gr. (Ia.) 467; *Levy v. Taylor*, 24 Md. 282; *Rubon v. Stephan*, 25 Miss. 253; *Roberts v. White*, 73 N. Y. 375; *Sturges v. Knapp*, 36 Vt. 439.

§ 681. **Reduction of damages.**—In conformity with the general principle of indemnity, the rules of reduction applicable to trover and other classes of action, are recognized here. Thus where a plaintiff in the original action in which he had obtained an attachment, had been nonsuited, he was permitted to show in reduction of damages in the action on the attachment bond, that the property thus attached had been reattached in a subsequent action by him, which had been prosecuted to a judgment, under which the property was sold.^(a) Had the original taking been *mala fide*, however, without color of legal right, it may be inferred, from the opinion of the court, that this would not have been allowed. But in Oregon the same decision has been reached where the first attachment was not made in good faith.^(b) So, again, where the statute provided that in actions to determine claims to real property, the plaintiff must recover on the strength of his own title, it was held in an action on a bond given upon the granting of an injunction to restrain a plaintiff from cutting timber on a tract of land, that the defendant might show in reduction that the plaintiff had no title to the land and no right to cut timber on it.^(c) In a suit upon a forfeited delivery bond, given by the claimants of property seized under execution against another, the defendants cannot be permitted to show in reduction of damages that the property belonged to them.^(d)

§ 682. **Attachment bonds.**—Where a party gives a bond before suing out an attachment on personal property, the direct loss of the owner is the loss of use of the property

^(a) *Earl v. Spooner*, 3 Den. 246.

^(b) *Morrison v. Crawford*, 7 Ore. 472.

^(c) *Jenkins v. Parkhill*, 25 Ind. 473.

^(d) *Waterman v. Frank*, 21 Mo. 108.

pending attachment proceedings; and the value of the use of the property may therefore be recovered in an action on the bond.^(a) The owner may also recover compensation for a depreciation in the value of the property, measured by the difference in the value of the property at the time of suing out the attachment and at the dissolution of it.^(b) Where the property, being perishable, was sold, the measure of damages is the value of the property, not necessarily the amount for which it sold.^(c) Loss of credit caused by the attachment cannot be compensated for.^(d) But where by the attachment a party is prevented from performing a contract, and material or property prepared or procured to enable him to do so is thus depreciated in its value to him, such damage has been held to be embraced in the attachment bond.^(e)

In an action on an attachment bond, where the property attached—cattle—was removed from a good range to a bad one, plaintiff was allowed to recover the increased value they would have acquired by being fattened on a good range.^(f) Where real estate is attached, the owner's possession not being disturbed, the damages will usually be nominal. No recovery can be had for depreciation in the value of the property.^(g)

§ 683. Rule in Alabama and Tennessee.—Under the Alabama and Tennessee statutes, if the wrongful attach-

(a) *Bruce v. Coleman*, 1 Handy (Oh.) 515; *Munnerlyn v. Alexander*, 38 Tex. 125.

(b) *Frankel v. Stern*, 44 Cal. 168; *Bruce v. Coleman*, 1 Handy (Oh.) 515; *Doll v. Cooper*, 9 Lea 576.

(c) *Woolner v. Spalding*, 65 Miss. 204.

(d) *Holliday v. Cohen*, 34 Ark. 707; *Heath v. Lent*, 1 Cal. 410; *Campbell v. Chamberlain*, 10 Ia. 337; *Plumb v. Woodmansee*, 34 Ia. 116; *Lowenstein v. Monroe*, 55 Ia. 82; *Pettit v. Mercer*, 8 B. Mon. 51.

(e) *Carpenter v. Stevenson*, 6 Bush 259.

(f) *Hoge v. Norton*, 22 Kas. 374.

(g) *Heath v. Lent*, 1 Cal. 410.

ment be malicious, injuries to credit and business and exemplary damages may be recovered in an action on the bond.^(*) This is the same measure of damages which is adopted in an action of tort for malicious attachment.^(b) The allowance of exemplary damages is based, in Alabama at least, on the peculiar wording of the statute, which expressly provides for damages for "the wrongful or the vexatious" suing out of the writ.^(c) As a consequence of this right to recover exemplary damages, probable cause may be shown in mitigation.^(d)

§ 684. Bonds to dissolve attachment.—Bonds to dissolve attachment (also called forthcoming bonds) are conditioned sometimes to produce the property, sometimes to pay the judgment. In the former case the measure of damages in an action on the bond is the value of the property;^(e) in the latter case, the amount of the judgment.^(f) In an action upon a forthcoming bond, it appeared that a mortgagee having a prior claim had subjected the property to the satisfaction of a portion of his debt, the property being worth less than the mortgage; and only nominal damages were awarded.^(g)

(*) *Kirksey v. Jones*, 7 Ala. 622; *McCullough v. Walton*, 11 Ala. 492; *Sharpe v. Hunter*, 16 Ala. 765; *Forrest v. Collier*, 20 Ala. 175; *Seay v. Greenwood*, 21 Ala. 491; *City National Bank v. Jeffries*, 73 Ala. 183; *Doll v. Cooper*, 9 Lea 576.

(b) § 467.

(c) On a *ne exeat* bond, under a statute providing only for damages caused by the "wrongful" suing out of the writ, it was held that the plaintiff could recover his actual damages; but that if he would recover damages as for a malicious act, he must sue in case. *Spivey v. McGehee*, 21 Ala. 417.

(d) *Metcalf v. Young*, 43 Ala. 643.

(e) *Hammond v. Starr*, 79 Cal. 556; *Collins v. Mitchell*, 3 Fla. 4; *Moon v. Story*, 2 B. Mon. 354 (*semble*); *Pearce v. Maguire*, 17 R. I. 55; *Jones v. Hays*, 27 Tex. 1.

(f) *Collins v. Mitchell*, 3 Fla. 4 (*semble*); *Phansteihl v. Vanderhoof*, 22 Mich. 206; *Morange v. Edwards*, 1 E. D. Sm. 414.

(g) *Dehler v. Held*, 50 Ill. 491.

§ 685. *Injunction bonds.*—Where the injunction prevented the sale of property, the measure of damages, in an action on the bond, is the depreciation in the value of the property between the time of obtaining the injunction and the time of its dissolution.^(*) Since the plaintiff has been deprived of the use of money representing the value of the property at the time of obtaining the injunction, it would seem that he should recover interest on that amount ; which would be the ordinary measure of damages when there is no diminution in the value of the property. And it has been so held in a case where the plaintiff was enjoined from foreclosing a mortgage.^(b) Where there has been depreciation in value, however, interest seems never to have been asked for upon the whole value. Interest has been given on the depreciation in value, but apparently from the time the injunction was dissolved.^(c) Where the injunction prevented the use of land, the value of the use may be recovered ; if the property is real estate, the mesne profits of it.^(d) The lease of a railroad having been enjoined, the measure of damages in an action on the bond is the rent pending the injunction.^(e)

Where the injunction prevented the carrying on of a business, the measure of damages is the value of the use of the premises, and wages paid for guarding the property and to employees under contract of service.^(f) Where the plaintiff was enjoined from working a mine, it

(*) *Brandamour v. Trant*, 45 Ill. 372 ; *Levy v. Taylor*, 24 Md. 282 ; *Rubon v. Stephan*, 25 Miss. 253 ; *Meysenburg v. Schlieper*, 48 Mo. 426.

(b) *Wood v. Fulton*, 2 H. & G. 71.

(c) *Rubon v. Stephan*, 25 Miss. 253.

(d) *Hosmer v. Campbell*, 98 Ill. 572 ; *Rutherford v. Moore*, 24 Ind. 311 ; *Roberts v. White*, 73 N. Y. 375.

(e) *Sturges v. Knapp*, 36 Vt. 439.

(f) *Wood v. State*, 66 Md. 61 (injunction against working a saw-mill).

was held he could recover the value of the time while he was necessarily idle ;^(a) and it has also been held that he could recover the average profits of such operations as he had been engaged in prior to the injunction.^(b) The profits expected from a new business, as from an extension of railroad track enjoined by the defendant, are of course too conjectural for recover.^(c) Where the plaintiff was prevented from taking possession of a farm, it was held that he could recover compensation for loss of expected crops ;^(d) but this would seem to be too conjectural. A better rule would have been to allow him compensation for use of the land. Where the plaintiff was enjoined from building a stable he was allowed to recover for injury to his cattle by being without shelter, and for the decreased supply of milk.^(e)

Where the injunction restrained the collection or payment of a debt, interest on the amount of the debt cannot be recovered unless for some reason no interest can be recovered from the debtor upon the debt, as for instance through his insolvency,^(f) or because he has paid the money into court pending the injunction ;^(g) any hardship to the plaintiff through failure to get his money is too remote. Where the injunction restrained the taking possession of property, which was destroyed by

(a) *Muller v. Fern*, 35 Ia. 420. The burden is here upon the plaintiff to show due diligence in seeking other employment, for he must show that he was damaged ; the case differs from an action on a contract of service, where it is for the defendant to show why he should not pay the amount named in the contract.

(b) *Gear v. Shaw*, 1 Pin. (Wis.) 608.

(c) *Chicago C. Ry. Co. v. Howison*, 86 Ill. 215.

(d) *Edwards v. Edwards*, 31 Ill. 474.

(e) *Lange v. Wagner*, 52 Md. 310.

(f) *Derry Bank v. Heath*, 45 N. H. 524 ; but see *semble contra*, *Staples v. White*, 88 Tenn. 30.

(g) *Bullock v. Ferguson*, 30 Ala. 227.

the possessor pending the injunction, it has been held that the value of the property may be recovered in an action on the bond.^(*) Where the injunction restrained the plaintiff from cutting timber on certain land, the defendant, in an action on the bond, may show that the plaintiff had no title to the land and no right to cut timber on it.^(b) The plaintiff was enjoined from building a railroad to his works; pending the injunction he sold the works. In an action on the bond it was held that he could not recover the amount by which the cost of building the road would be increased because of the delay; but that if he had retained the property and built the road, he could have recovered any increase in cost caused by the injunction.^(c)

§ 686. *Bail bonds.*—In an action upon a bail bond, given to the sheriff to secure the release of a debtor, the measure of damages is the amount of the judgment upon the debt,^(d) but the defendant may show that at the time of the breach the debtor was insolvent.^(e) In a suit upon a poor debtor's bond, the damages will be the amount of the judgment and the costs of the action in which it was given, with the interest thereon.^(f) The same is the measure on a prison-bonds' bond in Virginia.^(g)

§ 687. *Arbitration bonds.*—In an action upon a bond

(*) *Barton v. Fisk*, 30 N.Y. 166; *contra*, *Cummings v. Mugge*, 94 Ill. 186.

(b) *Jenkins v. Parkhill*, 25 Ind. 473.

(c) *Morgan v. Negley*, 53 Pa. 153.

(d) *New Haven Bank v. Miles*, 5 Conn. 587.

(e) *Sargent v. Pomroy*, 33 Me. 388; *Kellogg v. Manro*, 9 Johns. 300; *Brown v. Paxton*, 19 Up. Can. Q. B. 426. *Contra*, *Hall v. White*, 27 Conn. 488; *Kerr v. Fullarton*, 10 Up. Can. C. P. 250; *M'Kenzie v. Marsh*, 2 Kerr (N. B.) 629.

(f) *Richards v. Morse*, 36 Me. 240; see, also, *Houghton v. Lyford*, 39 Me. 267.

(g) *McGuire v. Pierce*, 9 Gratt. 167.

to abide the award of arbitrators, the measure of damages is the amount of the award, if a pecuniary award was made,^(*) even though the authority of the arbitrators was revoked by the defendant, one of two debtors, after the testimony was in and pending the decision.^(b) Where the award required security to be given at once, and the money paid in instalments, the plaintiff upon a failure to give security, may at once recover the whole amount of the award.^(c) When the bond was to abide an award as to a disputed boundary line, it was held that the plaintiff could recover the expenses incurred in defending a suit in equity brought by the defendant to set aside the award.^(d)

§ 688. **Appeal bonds.**—Where a judgment for the recovery of land is appealed from, the measure of damages in an action upon the appeal bond includes the value of the use of the premises pending the appeal.^(e) Where a judgment for the sale of property was appealed from, the plaintiff in an action on the bond may recover interest on the amount that would have been realized.^(f) If the property has depreciated in value pending the appeal, the amount of the depreciation can be recovered; but rents collected by the defendant cannot be recovered.^(g) Where an order appointing a receiver of property was appealed from, and the owner sold the property pending the ap-

(*) *Shroyer v. Bash*, 57 Ind. 349.

(b) *Hatheway v. Cliff*, 2 All. (N. B.) 267.

(c) *Bond v. Bond*, 16 Up. Can. C. P. 327.

(d) *Henry v. Davis*, 123 Mass. 345.

(e) *Cahall v. Citizens' M. B. Assoc.*, 74 Ala. 539. *Contra* on a bond given in the form required in the U. S. Courts, if not recovered in the original action: *Burgess v. Doble*, 149 Mass. 256.

(f) *Jenkins v. Hay*, 28 Md. 547.

(g) *Cook v. Marsh*, 44 Ill. 178.

peal, the value of the property at the time of the appeal is the measure of damages.^(*)

In Vermont, where an appeal was taken in an action to recover a debt, it was held that the plaintiff could recover compensation for damage to his chance of collecting the debt, to be determined by proof of amount of the appellant's property from the time of the appeal to final judgment.^(b) The plaintiff brought an action of *quo warranto* against the defendant, who had usurped an office to which the plaintiff was elected. Judgment having been given for the plaintiff, the defendant appealed and gave a bond. In an action upon the bond, after the appeal had been dismissed, it was held that the plaintiff in an action upon the bond could recover the amount of salary received by the defendant pending the appeal.^(c) The appeal bond in the United States courts binds the obligors to pay the amount of the judgment, up to the penalty of the bond.^(d)

§ 689. **Replevin bonds.**—In debt on a replevin bond conditioned to pay all such damages as the defendants in the action should recover, the measure of damages is the judgment in the replevin suit.^(e) Though the suit was not entered in court, the defendant, in an action upon the bond, may show that the title to the property replevied was in himself; and in that case only nominal damages can be recovered.^(f) So it may be shown that the action

(*) *Everett v. State*, 28 Md. 190.

(b) *McGregor v. Balch*, 17 Vt. 562.

(c) *U. S. v. Addison*, 6 Wall. 291. So in an action of *quo warranto*: *Nichols v. MacLean*, 101 N. Y. 526; *People v. Nolan*, 101 N. Y. 539.

(d) *Sessions v. Pintard*, 18 How. 106. So in Illinois: *Stelle v. Lovejoy*, 125 Ill. 352.

(e) *Kenley v. Commonwealth*, 6 B. Mon. 583; *Karthaus v. Owings*, 6 H. & J. 134; *Claggett v. Richards*, 45 N. H. 360.

(f) *Wallace v. Clark*, 7 Blackf. 298; *Jones v. Smith*, 79 Me. 452.

of replevin failed merely because it was prematurely brought.^(*) So, in a suit against the surety on a bond given in an action of detinue, the condition of which had been broken by the plaintiff in that action submitting to a nonsuit, the fact that he was the owner of the property sued for, though no defense to the action on the bond, goes in reduction of the damages.^(b)

A common form of replevin bond is conditioned to pay the value of the property replevied. The measure of damages in a suit upon such a bond is the value of the property at the time and place of taking without regard to a subsequent fall of value.^(c) Damages may be recovered for the unlawful taking, though not assessed in the replevin suit.^(d) In Indiana, when the replevin bond is forfeited, the statute authorizes the defendant (in replevin) to recover, in a suit on the bond, such sum as shall be just and equitable; and if the plaintiff recover, he shall in like manner recover damages for the detention of the goods and chattels. An effort was made under this statute to obtain for the defendant in replevin, an allowance for his counsel fees and time lost in attendance on court in the replevin suit; but it was denied.¹ The limit of recovery against the sureties being the penalty, that is the measure of recovery if the property is of greater value.^(e)

A detinue bond is similar to a replevin bond. In an action on such a bond it was held that the plaintiff could

¹ *Davis v. Crow*, 7 Blackf. 129.

(*) *Davis v. Harding*, 3 All. 302.

(b) *Savage v. Gunter*, 32 Ala. 467.

(c) *Washington Ice Co. v. Webster*, 125 U. S. 426.

(d) *Washington Ice Co. v. Webster*, 62 Me. 341; see, also, *Woodburn v. Cogdal*, 39 Mo. 222; *Lutes v. Alpaugh*, 23 N. J. L. 165. So on detinue bond: *Hudson v. Young*, 25 Ala. 376.

(e) *Hefford v. Alger*, 1 Taunt. 218; *Sweeney v. Lomme*, 22 Wall. 208.

not recover for loss of time and hotel bills paid in procuring sureties on the bond, and in attending the trial of the case.^(*)

§ 690. *Value of property when to be estimated.*—Under the judgment for a return the same question arises, which we have already examined, as to the time when the value should be computed: whether at the time of the replevin, or the highest price down to the time of the trial. It has been suggested in New York,¹ that the former period is to furnish the rule. In an action of debt on a replevin bond in Massachusetts, the original plaintiffs having been defeated, but refusing to restore the goods on the writ of restitution, the question was considered whether the value of the goods should be computed at the valuation in the replevin bond; the actual value of the property at the time of the service of the replevin writ; at the time of the verdict rendered; or at the time of the demand made under the writ of restitution: it seems from the report that the property at the time was still in the possession of the defendant; and the latter was held the true rule.² And the same rule was followed in Maine, where the property had increased in value.^(b)

§ 691. *Destruction of property before payment.*—* In a case in New York, it was decided in a suit on the replevin bond, that the non-return of the property was excused by its inevitable destruction before judgment.³ This decision was based on the old rule that if the condition of a bond became impossible by the act of God, the penalty

¹ *Brizsee v. Maybee*, 21 Wend. 144. *Jenkins*, 3 Sandf. 614. In Maine, see
² *Swift v. Barnes*, 16 Pick. 194. See *Howe v. Handley*, 28 Me. 241.
 this case commented on in *Suydam v.* ³ *Carpenter v. Stevens*, 12 Wend. 589.

(*) *Foster v. Napier*, 74 Ala. 393.

(b) *Washington Ice Co. v. Webster*, 62 Me. 341.

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is saved.¹ But it seems contrary to principle, and has been expressly disapproved of.² As between parties to a contract, it seems very reasonable that all interested in its execution should bow to the superior power which renders its performance impossible. But it cannot be tolerated that a wrong-doer should be excused by any subsequent accident. Nor do the analogies of the law justify any such decision. In trover or trespass for goods after the conversion or trespass was complete, the party in fault would certainly never be admitted to excuse himself by alleging that the property had perished in his hands without his fault. The court appears rather to have looked to the technical form of the action than to the substantial justice of the case.** (*)

In *Walker v. Osgood* (*) it appeared that the property, a horse, had been replevied by one who claimed to be owner from a sheriff who seized it as the property of another. In an action upon the replevin bond by the sheriff, who had succeeded in the replevin suit, the claimant was held excused by showing that the horse had died without his fault; for, the court said, he had as good right to litigate his claim as the attaching creditor.

§ 692. **Official bonds.**—* The questions examined in the chapter upon the measure of damages in suits against public officers may arise, as in the instances which we have considered, in suits brought by the aggrieved party against the officer directly; or otherwise, on the bond, given by him for the faithful discharge of his duty; or, again, they may be brought against the sureties of the officer. In the case of the suit being brought on the

¹ 2 Black. Com. 341.

² *Suydam v. Jenkins*, 3 Sandf. 614.

(*) See *Hinkson v. Morrison*, 47 Iowa 167.

(*) 53 Me. 422.

bond, much depends on the form of the instrument and the statute under which it is given. So, in Ohio, an action of debt being brought on a sheriff's bond for neglect to sell property levied on, the rule of damages was held to be the value of the property, and not the amount of the judgment, and execution was only allowed to issue for the former sum, the language of the statute under which the bond was given being, that "execution might issue for such sum as it might be ascertained would be sufficient to *indemnify* the person so suing."¹*** So, in an action against the sheriff's sureties for an escape, the defendants are liable only for the damages (to the extent of the penalty) actually sustained through that officer's breach of duty. The plaintiff is not entitled as of course to the amount of his judgment against the escaped debtor.^(a)

In an action of debt upon a sheriff's bond, at common law, the whole penalty would be recoverable; but, by statute in many of the States, no greater recovery can be had than the actual damage done.^(b) In some of the States, judgment is rendered for the full amount, but execution issues only for the plaintiff's damage proved.^(c) In a suit upon a bond given under a provision of a statutory enactment in Maine, for a breach of its condition, where a default was submitted to, it was held that the damages were to be assessed by the court and not by the jury; and the amount was the *actual* damage sustained by such breach.^(d) So in Pennsylvania.^(e) And in

¹ State v. Myers, 14 Ohio 538.

(a) State v. Johnson, 1 Ind. 158.

(b) So in Georgia: Taylor v. Johnson, 17 Ga. 521.

(c) In Iowa: Nelson v. Gray, 2 Greene 397; see, also, Cameron v. Boyle, 2 Greene 154.

(d) Clifford v. Kimball, 39 Me. 413.

(e) Commonwealth v. Allen, 30 Pa. 49.

Maryland, in a suit on a guardian's bond, it was held that the actual loss suffered by the plaintiffs furnished the measure of damages.^(*)

In an action *by* the sheriff on the undertaking or bond given to him on the arrest of a party for a tort in a civil action, in which action judgment has been obtained and the execution thereon returned unsatisfied, the measure of the sheriff's damages is, *prima facie*, the amount of the original bail which is the *prima facie* measure of the recovery to which also the plaintiff in the original action is entitled against him.^(b)

§ 693. **Actions against sureties.**—* In a case in Massachusetts, brought against the sureties of a constable's bond, where the breach assigned was an illegal levy, and it appeared doubtful whether all the property in question was taken *colore officii*, a verdict being taken for the penalty of the bond, the court said: "If it appears that *any* of the property was taken by color of office, as it, no doubt, does here, that shows an official misfeasance, which is a breach of the bond, and entitles the plaintiff to judgment as for such breach. But when it comes to the assessment of damages, and it is open to question whether the trespass, for which judgment was recovered in the action of trespass, was done by color of office, it will, no doubt, be competent to the court or jury who assess the damages, to ascertain what portion of the property was so taken; for it is that part only which is in question in this suit." It was also held that the fact that the goods levied on had been mortgaged by a previous owner before the levy, and that they had been delivered by the constable to the mortgagee on his demand, was no defense to the action;

(*) *State v. Bishop*, 24 Md. 310.

(b) *Willet v. Lassalle*, 19 Abb. Pr. 272.

but that, upon a hearing in equity, this evidence would be admissible in reduction of damages.^{1**}

§ 694. *Miscellaneous bonds.*—In an action on a sequestration bond, the plaintiff, in addition to the rents, may recover expense and inconvenience of removal.^(*) A commissioner to construct a drain filed a bond, and collected the assessment for building it; but he failed to complete the drain. In an action on the bond it was held that the measure of damages was the amount required to complete the drain.^(b) In an action on a bond given by an administrator upon obtaining a license to sell real estate, the measure of damages is the amount of the proceeds of the sale not accounted for by the administrator, and the costs of proceedings to compel him to account, but not counsel fees paid in such proceedings.^(c)

¹ *City of Lowell v. Parker*, 10 Met. 309, 315. For cases in other States, see *State Treasurer v. Weeks*, 4 Vt. 215; *Governor v. Matlock*, 1 Hawks 425; *Duncan v. Klinefelter*, 5 Watts 141; *Hazard v. Israel*, 1 Binn. 240; *Shewel v. Fell*, 3 Yeates 17; s. c. 4 Yeates 47; *Eaton v. Ogier*, 2 Me. 46; *Riggs v. Thatcher*, 1 Me. 68; *Gibson v. The Governor*, 11 Leigh 600; *Brugh v. Shanks*, 5 Leigh 598; *Rootes v. Stone*, 2 Leigh 650; *Smith v. Hart*, 2 Bay 395; *Patten v. Halsted*, 1 N. J. L. 277; *Gerrish v. Edson*, 1 N. H. 82; *Webster v. Quimby*, 8 N. H. 382; *Bruce v. Pettengill*, 12 N. H. 341; *Peverly v. Sayles*, 10 N. H. 356; *Sawyer v. Whittier*, 2 N. H. 315; *Sanborn v. Emerson*, 12 N. H. 57; *Richards v. Gilmore*, 11 N. H. 493; *Runlett v. Bell*, 5 N. H. 433; *Perkins v. Thompson*, 3 N. H. 144; *Cady v. Huntington*, 1 N. H. 138; *Taylor v. Commonwealth*, 3 Bibb 356; *Ackley v. Chester*, 5 Day 221.

(*) *Blum v. Gaines*, 57 Tex. 135.

(b) *Smith v. State*, 117 Ind. 167.

(c) *Mann v. Everts*, 64 Wis. 372.

CHAPTER XXIII.

THE MEASURE OF DAMAGES IN ACTIONS UPON NEGOTIABLE INSTRUMENTS.

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| § 695. The face value recoverable. | § 703. Pledged paper. |
| 696. Interest. | 704. Measure of liability of an indorser. |
| 697. Interest by the civil law. | 705. Costs of prior suit. |
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| 701. Costs of protest and re-exchange, when not allowed. | |
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§ 695. The face value recoverable.—*The subject of negotiable paper is so amply discussed in the various treatises devoted to this particular branch of the law, that it will only be necessary for us in this place to take a brief view of the general principles regulating the compensation awarded for the breach of contracts of this class.**

When recovery can be had upon a negotiable instrument, the amount of recovery is the face value of the instrument, without regard to the amount actually paid for it by the holder.(*) The case of a pledgee presents an exception to this general rule, which will be considered later. In Massachusetts the anomalous doctrine prevails that in a suit between the original parties, if the consideration of a note is inadequate, or fails in part, the amount equitably due may be recovered in an action upon the note.(b) So where a note was given

(*) *Murphy v. Lucas*, 58 Ind. 360; *Murray v. Judah*, 6 Cow. 484; *Deas v. Harvie*, 2 Barb. Ch. 448; *Croft v. Bunster*, 9 Wis. 503.

(b) *Sanger v. Cleveland*, 10 Mass. 415; *Daggett v. Daggett*, 8 Cush. 520.

for the purchase of a horse, which proved to be unsound, the court deducted from the amount of the note the difference in value of the horse if he had been sound and as he actually was.^(a)

§ 696. Interest.—* In actions brought on promises to pay a liquidated sum of money, as on promissory notes or bills, where no question arises as to the currency or rate of exchange, the rule of damages is a fixed and arbitrary one. It is identical with the rate of legal interest. The actual damages may be much greater; the non-performance of the obligation may have occasioned the greatest distress, nay, even extreme positive loss; it may have produced actual insolvency. These remote results the law, however, does not investigate.^(b) It takes the rate of interest as the measure of damages; and so, says Pothier, "as the different damages which may result from the failure to perform this kind of obligation vary infinitely, and as it is as difficult to foresee as to excuse them, it has been found necessary to regulate them as by a species of penalty, and fix them at a precise sum."^(c)**

§ 697. Interest by the civil law.—* With this, the general language of the modern civil law accords. The damages resulting from the non-performance of contracts to pay money are limited to the infliction of interest. "Interest," says Domat,¹ "is the name applied to the compensation which the law gives to the creditor who is entitled to recover a sum of money from his debtor in default." So, too, the Roman law: *In bonæ fidei contractibus usuræ ex morâ debentur.*²

¹ *Traité des Oblig.*, part i, ch. ii, art. 3, 170.

² L. 32, § 2, Ff. *De usur.*; propter moram. L. 17, § 3, in fine eodem.

³ Liv. iii, tit. v, § 1.

(a) *Davis v. Elliott*, 15 Gray 90.

(b) *Lewis v. Lee*, 15 Ind. 499.

(c) *Heyman v. Landers*, 12 Cal. 107.

These principles, equally recognized by our system, are embodied in the French Code by a positive provision,¹ the correctness of which is thus supported and expounded by one of the ablest commentators on that law :

"It is certain that the non-payment of money when due may cause, and often actually causes, the creditor loss much beyond the legal interest on the sum. For want of the funds on the receipt of which his calculations are made, he may have been compelled to borrow, himself, and to submit to the exactions of the usurer. He may have been prosecuted, in a manner calculated to destroy his credit. He may have been ejected from his property ; have become bankrupt ; his house may have gone to ruin for want of repair. He may have lost highly advantageous bargains.

"But how are we to distribute these losses according to their real cause, and fix on those which should be imputed to the party in default ? How is any equitable valuation to be made of them ? Add to this, that the non-payment of money is the most common of all cases which give rise to damages, and we shall perceive that the peace of society would be harassed by this infinite multitude of settlements, and the litigation that would result from them.

"The law prevents this, by declaring that the damages shall never exceed legal interest from the day that payment becomes due ; and this, which is a species of forfeiture, may often be advantageous to the creditor.

"Whatever may be the damage that he has suffered by the delay in receiving his funds, whether the debtor was animated by malicious or even fraudulent motives, the creditor cannot, it is true, demand any other compensation than legal interest on his demand. But, on the other hand, he is not required to prove the damages that the delay may have caused. And this

¹ Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages et intérêts résultants du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérêts fixés par la loi, sauf les règles particulières au commerce et au cautionnement.

Ces dommages et intérêts sont dus, sans que le créancier soit tenu de justifier d'aucune perte.

Ils ne sont dus que du jour de la demande, excepté dans les cas où la loi les fait courir de plein droit. Code C. Art. 1153.

provision, which fixes the measure of damages for non-payment of money at legal interest, is founded on a principle of equity.

"In cases of the non-performance of other contracts, the party in default, as the lessee who violates his contract of letting, or the architect who, by his negligence, causes the destruction of a house, must be fully apprised of the nature of the loss that may result from the non-performance of his duty; whereas with money it is different.

"On the contrary, the engagement to pay a sum of money has no precise relation to any particular damage; it is impossible to know what will result from its non-payment; it is impossible to see what the creditor will lose, or how much he will lose; whether he will be compelled to borrow—whether he will be driven from his house and reduced to bankruptcy—whether his business or his credit will suffer; it is impossible to predict any one event among the thousand which are possible, and which depend upon the situation of the creditor's affairs.

"Money being the common measure of all things, has not, like other things, any peculiar function. It takes the place of all other things. The loss experienced, then, by those who are not paid at maturity is as diversified as the use that they might make of the money, and as unforeseen as the wants from which the injury might arise. They are, in regard to the debtors, like fortuitous cases, impossible to foresee, and which for this reason their obligation does not embrace."¹

And it should be borne in mind, as Pothier also well remarks, that if, on the one hand, the creditor cannot recover anything beyond the legal interest, so, on the other hand, he is not put to any proof of damage whatever.² It is an arbitrary assessment of damages, in the nature of the *Lex Aquilia* of the Roman system. He can, it is true, recover but the legal rate of interest; but then, on the other hand, he might, in fact, not have been able to gain any interest whatever during the time he has been deprived of his funds.**

¹ Toullier, vol. VI, liv. 3, tit. 3, ch. iii. De l'Effet des Obligations, 230 *et seq.*

² So says the civil code of Louisiana, "The damages due for delay in the performance of an obligation to pay

money, are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered, he can recover no more." Art. 1935.

§ 698. **Interest not formerly allowed.**—* “It is a dictate of natural justice and the law of every civilized country, that a man is bound in equity not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence, every nation, whether governed by the civil or the common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest.”¹ Such is the language of the Supreme Court of the United States; but is to be taken with much allowance. The thunders of the early church² were levelled against interest and usury indiscriminately; and up to the time of Henry VIII., as we are told by Lord Mansfield,³ “all interest on money lent was prohibited by the common law, as it is now in Roman Catholic countries.”⁴ This statute simply provided that none should take for any loan or commodity above the rate of ten pounds for one hundred pounds for one whole year, which rate was reduced to five per cent. by a subsequent statute, passed in the reign of Queen Anne.⁵ ** The tendency of enlightened modern opinion is in favor of leaving the whole matter to be regulated by contract, and this has led in England, Massachusetts, and elsewhere to the repeal of the old statutes against usury; the law merely providing a rate to be applied in the absence of express contracts.

§ 699. **Now universally allowed.**—Interest is now every-

¹ *Curtis v. Innerarity*, 6 How. 146, 154.

² See Voltaire's article, *Intérêt*, in the *Dictionnaire Philosophique*, where he represents a Jansenist Abbé remonstrating with a Dutch merchant against taking interest: *Prenez garde; vous vous damnez; l'argent ne peut produire de l'argent—ne peut produire de l'ar-*

gent: nummus nummum non parit. The hostility of the church was founded on the prohibition in the Old Testament, “Thou shalt not lend upon usury to thy brother.” Deut. xxii. 19, 20.

³ *Lowe v. Waller*, Doug. 736, 740.

⁴ See also *Robinson v. Bland*, 2 Burr. 1077, 1086.

⁵ 12 Anne, Stat. 2, c. xvi.

where regarded as the proper measure of damages for the non-payment of bills and notes. In the United States it seems that a jury should be instructed to give interest, on the same principle on which they are instructed to give the market value of goods or the market price of the hire of an article, for interest is the market price of the hire of the use of money,^(*) and that is in fact the rule universally adopted.^(b)

§ 700. **Foreign bills—Re-exchange.**—* If a bill of exchange be properly an inland bill, and if there be no difference between the currency or rate of exchange at the time and place where the bill is drawn and the time and place where it is payable, then the measure of damages is the same as that in regard to notes ; but in regard to foreign bills of exchange generally, the question becomes more complicated by the introduction of the element of re-exchange.

The general rule is, that the holder of a bill protested for non-payment is entitled to the amount of the bill, re-exchange, and charges.^(c)

“Re-exchange,” says Mr. Chitty,¹ “is the exchange incurred by the bill being dishonored in a foreign country in which it is payable and returned to the country in which it is made or indorsed, and there taken up. The amount of it depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange ; it suffices if he be liable to pay it ; but if the jury find that there was not at the

¹ Bills, 684.

(*) See, *per* Spencer, Senator, *Rensselaer Glass Factory v. Reid*, 5 Cow. 587, 610.

(b) See chap. x.

(c) *In re Gillespie*, 16 Q. B. D. 702. When necessary, notice of protest may be sent by a special messenger, and the cost recovered. *Pearson v. Crallan*, 2 Smith 404.

time any course of re-exchange between the two foreign places, then no re-exchange is recoverable."¹

"By re-exchange," says Mr. Justice Story, "is meant the amount for which a bill can be purchased in the country where the acceptance is made, drawn upon the drawer or indorser, in the country where he resides, which will give the holder of the original bill a sum exactly equal to the amount of that bill at the time when it ought to be paid, or when he is able to draw the re-exchange bill, together with his necessary expenses and interest, for that is precisely the sum which the holder is entitled to receive, and which will indemnify him for its non-payment."²

The question of re-exchange usually arises in regard to the drawers and indorsers; for the acceptor is not, upon non-payment of the bill, ordinarily liable to the holder for anything more than the principal sum, and the expenses of the protest, with interest.³ But if he has expressly or impliedly agreed with the drawer, or with any indorser, for a valuable consideration, to pay the bill at its maturity, and has failed to do so, and the drawer or indorser has been compelled to take up the bill, and pay damages and other expenses necessarily incurred thereby, he may, perhaps, be compellable fully to indemnify the drawer or indorser for all the damage and expense so paid by him, on account of the breach of his contract.⁴

The subject of re-exchange is very differently treated in England and in the United States. The rate which the holder is entitled to recover depends in the former

¹ See, also, *De Tastet v. Baring*, 11 East 265, where the origin and principle of the right to redraw is gone into at large. *Mellish v. Simeon*, 2 H. Black. 378, 379; *Pollard v. Herries*, 3 B. & P. 335.

² Story on Bills, § 400.

³ *Bowen v. Stoddard*, 10 Met. 375; *Newman v. Goza*, 2 La. Ann. 642.

⁴ Story on Bills, § 398; Chitty on

Bills, part 2, ch. vi, 684 to 687; *Woolsey v. Crawford*, 2 Camp. 445; *Napier v. Schneider*, 12 East 420; *Bayley on Bills*, ch. ix, 353; *Riggs v. Lindsay*, 7 Cranch 500; *Bowen v. Stoddard*, 10 Met. 375; *Pothier de Change*, 115, 117.

It has been decided in Pennsylvania that the acceptor is not liable for re-exchange. *Watt v. Riddle*, 8 Watts 545.

country on the actual course of exchange, as proved at the trial; while in this country, with that leaning to a fixed rule, which we shall have occasion again to notice, when speaking of the subject of insurance, the amount of re-exchange is generally regulated by positive statutory provision.

To obtain a correct appreciation of this branch of our law, it is necessary to consult those treatises which are specially devoted to it; it will be enough here to make a brief examination of a few of the cases which have been decided in this country, and a reference to the statutory provisions of the various States; in making which it should be borne in mind that these statutes have no extra-territorial operation. Thus it has been held in Massachusetts, that the statute of Maine, which enacts, that in an action on a bill of exchange drawn or indorsed in that State, but payable out of it, and protested for non-payment, the holder shall recover three per cent. damages in addition to the contents of the bill and interest—does not entitle the holder to recover those damages in a suit against the acceptor in the courts of Massachusetts.¹

The desire to establish a fixed rule in the matter of re-exchange manifested itself in this country at an early period of our colonial history. In Pennsylvania, as far back as the year 1700, the legislature enacted, that if any person within that province should draw or indorse any bill of exchange upon any person in England, or other parts of Europe, and the same should be returned unpaid, with a legal protest, the drawer and all concerned should pay the contents of the bill, with *twenty per cent. advance for the damage* thereof, in the same specie as the bill was drawn, or current money of that province, equivalent to

¹ Fiske v. Foster, 10 Met. 507.

that which was first paid to the drawer or indorser.¹ So in Massachusetts, the old rule, founded on usage (since modified by the statute), was to allow on all foreign bills drawn on England, and probably also upon any part of Europe, ten per cent. as damages in lieu of re-exchange.* (*)

In New York, the original usage was to allow twenty per cent. damages, in lieu of re-exchange, on all bills drawn on England or any part of Europe. In an action brought in New York, on a bill drawn by the defendant on a Liverpool house, indorsed to the plaintiff, and protested for non-payment, the plaintiff claimed twenty per cent. damages and interest, together with two per cent. for the difference of exchange, it being two per cent. above par when the defendant was notified of the non-payment of the bill. But the claim for this difference was refused, notwithstanding reliance was placed on a usage of the Chamber of Commerce. Spencer, J., said :

“The right to recover damages on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decision. . . . It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill, was originally co-extensive with the rule established in Pennsylvania, and that the same reasons induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant fluctuation and uncertainty of exchange.”

¹ See *Francis v. Rucker*, Ambler 672, *cent. Brown v. Van Braam*, 3 Dall. and *Hendricks v. Franklin*, 4 Johns. 344, 346.
119. In Rhode Island, as early as 1743, an act of similar purport was passed, fixing the damages at *ten per* ³ *Grimshaw v. Bender*, 6 Mass. 157, 161, 162.

(*) In Maine, the mercantile usage is the same. *Wood v. Watson*, 53 Me. 300. Such a rule of damages established by long usage has the force of law. It must be taken as part of the contract of indorsement, and cannot be changed by the court, whatever monetary crisis may occur. *Id.*

After saying that the usage of the Chamber of Commerce was too recent to alter the rule of law, he closed by stating :

"In my opinion, the twenty per cent. is in lieu of all claims for damages in such cases ; and the claim for the difference in the price of the bills cannot be supported, and therefore it must be deducted in this case."¹

In a subsequent case, however, in the Court of Errors,² though the twenty per cent. was allowed, the rule in regard to the sum on which it was assessed was altered. The court decided that the holder of a bill of exchange, drawn here on England, and protested there, was entitled to recover the contents of the bill at *the rate of exchange* on England *at the time of the return* of the dishonored bill and notice given to the drawer, and that the twenty per cent. damages and interest were to be calculated on this amount, as the principal sum, and not upon the fixed par of exchange. The judgment of the Supreme Court was reversed, but no reasons were assigned.* (*)

¹ Hendricks v. Franklin, 4 Johns. 119.

² Graves v. Dash, 12 Johns. 17.

³ The American Jurist for July, 1829, vol. ii, p. 79, contains an interesting article on the subject of Damages on Bills of Exchange. It states the difference between the system of re-exchange in force in Great Britain and France, and that of arbitrary damages adopted in the United States, and discusses various questions,—whether the European or American system is the best ; whether the want of a uniform law on the subject in the different States is an evil ; and if so, in what manner it should be redressed. An able report was made on the subject by Mr. Verplanck to the House of Representatives of the United States, in March, 1826, maintaining the right of Congress to control the subject, urging the importance of establishing a uniform rule, and strongly contending for the rule of actual re-exchange as opposed to that of arbitrary damages.

"In fact," says the report, "this principle is the only one which can perfectly and under all circumstances and fluctuations of exchange, secure anything like a fair compensation of the loss sustained by the holder of a dishonored bill, without the hazard of one party being sometimes but partially paid, or the other oppressed with the payment of unequal and ruinous damages. . . . If this principle be adopted, no valid reason appears why arbitrary damages should be added. If provision be made for the substantial fulfilment of the engagement of the seller of the bill, and if he acted in good faith, the requiring any additional sum as a mulct or penalty for the failure of some other person is useless and unjust, and as recent examples in some of our cities have proved, may be of the most dangerous consequences, and overturn the credit of many a fair trader who had made the amplest arrangements to meet all his engagements."

(*) Acc. Denston v. Henderson, 13 Johns. 322. But the holder of a bill of

We have thus far considered the damages and re-exchange on bills protested for non-payment. The same general principles govern the case of bills protested for non-acceptance. "On failure of the performance of the engagement that the drawee will accept," says Mr. Chitty,¹ "the drawer of a bill will immediately, and before the time specified in bill for payment, be liable to an action, not only for the principal sum, but also in certain cases for interest, re-exchange, and costs, as a consequence of the bill not being honored." This was decided as early as the year 1765,² and again by Lord Mansfield,³ on the ground that what the drawer had undertaken has not been performed, the drawer not having given the credit which was the ground of the contract; and the same point was held in an action by the indorsee against the indorser,⁴ each indorser being considered as a new drawer. It had been decided in bankruptcy to the same effect at an earlier day;⁵ and the rule in this country is the same.^{6**} In New York, the damages in cases of protest for *non-acceptance* are by statute fixed at the same rate as for non-payment. This was the rule before the statute.⁷ In Maine, in the absence of a statutory provi-

¹ Bills, 194.

² Bright *v.* Purrier, Bull. Nisi Prius 269.

³ Milford *v.* Mayor, 1 Doug. 54.

⁴ Ballingalls *v.* Gloster, 3 East 481.

⁵ Macarty *v.* Barrow, 2 Strange 949, of which a fuller report is given in Chilton *v.* Whiffin, 3 Wils. 13, 16.

⁶ Mason *v.* Franklin, 3 Johns. 202; and again in Weldon *v.* Buck, 4 Johns. 144. In France the rule appears to be different. On the protest for non-acceptance, the obligation of the parties indebted, says Pardessus, Cours de Droit Commercial, part ii, tit. iv, ch. iv, sec. 7, vol. 2, p. 424, is either to pay, to deposit the amount, or to give

security. And there are traces of some similar or analogous custom in England. In Bright *v.* Purrier, Bull. N. P. 269, the defendant offered to prove a commercial usage not to pay till protest for payment; and in Buller's Nisi Prius, p. 271, it is said: "When the bill is returned protested, the party that draws the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill ran for."

⁷ See reviser's notes to the 22d section, 1 R. S. 771. The point was expressly decided in Weldon *v.* Buck, 4 Johns. 144; and the same is the rule in England.

exchange remitted to pay an antecedent debt is not entitled to recover the twenty per cent. Kenworthy *v.* Hopkins, 1 Johns Cas. 108; Thompson *v.* Robertson, 4 Johns. 27.

sion, damages for protest are not allowed in a suit on a promissory note, though brought by an indorsee against an indorser, and payable in another State.^(*) In Kansas, where the general statutes provide that "drawers, indorsers, makers, and obligors" shall be liable for protest charges, it is held that guarantors are not included.^(b)

§ 701. Costs of protest and re-exchange, when not allowed.—Costs of protest are not allowable unless protest is necessary to fix the liability of the indorsers.^(c) They are not allowed when there are no indorsers,^(d) nor unless notice is given to the indorsers.^(e) Where a bill of exchange is only nominally a foreign bill, and is sent abroad, not that funds may there be used, but that they may be there obtained and remitted, there can be no recovery of re-exchange.^(f)

§ 702. Accommodation paper.—*“In general,” says Mr. Chitty, “between the original parties, or a holder who has not given full value, the defendant is at liberty to show that he drew, accepted, indorsed, or made the bill or note for the accommodation of the plaintiff, or of one of them, or of a person for whom he is a trustee, who either expressly or impliedly engaged to provide for the bill; or the defendant may show that he received no consideration, or none that was in point of law adequate, and thus may entirely defeat the action or reduce the claim.”¹ Therefore, where the defendant accepted the bill for the accommodation of the plaintiff, except as to a

¹ Chitty on Bills, 70.

(*) *Loud v. Merrill*, 47 Me. 351.

(b) *Woolley v. Van Volkenburgh*, 16 Kas. 20.

(c) *Ibid.*

(d) *Cramer v. Eagle M. Co.*, 23 Kas. 399.

(e) *Curtis v. Buckley*, 14 Kas. 449.

(f) *Willans v. Ayers*, 3 App. Cas. 133.

part; and where the plaintiff, as indorsee, had only advanced a part of the money made payable by the bill accepted for the indorser's accommodation, neither was allowed to recover more than he had advanced.¹ (*) But the consideration of this subject, in truth, appertains more properly to the right of recovery than to the measure of damages.**

§ 703. **Pledged paper.**—The pledgee of negotiable paper generally recovers the whole amount at maturity.^(b) But if the defendant had a valid defense against the pledgor, recovery can be only for the amount of the plaintiff's interest.^(c) So where the note was given originally to secure the defendant's debt, the measure of recovery in an action by the maker is the amount of the debt secured;^(d) and the same is true where the plaintiff is an indorsee with notice.^(e) So an insurance company can recover upon a premium note only the premiums already earned.^(f)

§ 704. **Measure of liability of an indorser.**—In an action by the indorsee against the indorser of a promissory note, the measure of damages is the amount paid by the indorsee, with interest, subject to the limitation that

¹ *Darnell v. Williams*, 2 Stark. 166; *Wiffen v. Roberts*, 1 Esp. 261.

(*) But where the defendant made a note to the plaintiff's order and the plaintiff indorsed it for the defendant's accommodation, who negotiated it, the plaintiff, having taken up the note at its maturity by paying half its face value, was allowed to recover the whole face value. *Fowler v. Strickland*, 107 Mass. 552. The plaintiff in other words was treated as an ordinary purchaser of the note.

(b) *Reid v. Furnival*, 1 C. & M. 538.

(c) *Steere v. Benson*, 2 Bradw. 560; *Williams v. Smith*, 2 Hill 301.

(d) *Vogan v. Caminetti*, 65 Cal. 438; *Rogers v. Smith*, 47 N. Y. 324; *Davis v. Funk*, 39 Pa. 243; *Union Nat. Bank v. Roberts*, 45 Wis. 373.

(e) *Atlas Bank v. Doyle*, 9 R. I. 76.

(f) *Maine M. M. Ins. Co. v. Farrar*, 66 Me. 133; *Maine M. M. Ins. Co. v. Stockwell*, 67 Me. 382.

the recovery must not exceed the sum due on the face of the note.^(a) So also where the law permits the assignment of a non-negotiable promissory note, and owing to the insolvency of the maker, or other sufficient cause, the assignee has failed to recover the amount from him; in an action against the assignor, the measure of the assignee's damages is the amount of the consideration paid by him and interest.^(b) So where a claim on the government had been assigned for a valuable consideration, but was not paid in consequence of its having been paid before under an authority previously given by the assignor, the assignee was held entitled to recover only the consideration paid with interest from the time of presenting the claim to the government.^(c) The amount paid by the indorsee or assignee is, however, presumably the face value of the note.^(d)

This rule rests upon the ground that the consideration for the payment of the purchase-money by the indorsee or assignee has failed, and the amount of it is therefore the measure of recovery. The reasoning does not apply to the case of an accommodation indorser, and the whole face value of the instrument may therefore be recovered from him.^(e)

§ 705. Costs of prior suits.—* Some other decisions have

(a) *In re* Many, 17 N. B. R. 514; *Cook v. Cockrill*, 1 Stew. 475; *Hutchins v. McCann*, 7 Port. 94; *Noble v. Walker*, 32 Ala. 456; *Bethune v. McCrary*, 8 Ga. 114; *Hawkinson v. Olson*, 48 Ill. 277; *Shaeffer v. Hodges*, 54 Ill. 337; *Short v. Coffeen*, 76 Ill. 245; *French v. Grindle*, 15 Me. 163; *Braman v. Hess*, 13 Johns. 52; *Munn v. Commission Co.*, 15 Johns. 43. But *contra*, *Watson v. Hahn*, 1 Col. 385; *Cook v. Clark*, 4 E. D. Smith 213.

(b) *Jones v. State*, 40 Ark. 344 (*semble*); *Foust v. Gregg*, 68 Ind. 399; *Schmied v. Frank*, 86 Ind. 250; *Davis v. Harrison*, 2 J. J. Marsh 189; *Muldrow v. Agnew*, 11 Mo. 616; *Whisler v. Bragg*, 31 Mo. 124.

(c) *Eaton v. Mellus*, 7 Gray 566.

(d) *Foust v. Gregg*, 68 Ind. 399; *Felton v. Smith*, 88 Ind. 149.

(e) *Ingalls v. Lee*, 9 Barb. 647.

been made upon the subject of the amount of recovery, which it may be proper to notice. An indorser who is sued on his indorsement, and subjected to costs, cannot recover those costs against the maker. He can only have the amount of the note and interest;¹ because, says the Supreme Court of New York, "if the indorser of a note be duly fixed, he ought to pay it without being sued; but if he finds it more convenient to delay taking up the note until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience. . . . The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser. There must be a special promise to save harmless before the payee can call upon the drawer for costs accrued by the default of the payee (indorser) himself." In a suit against the indorser, the fees of protest are a proper charge.² And an indorser who has paid the note can, it seems, recover the costs of protest against the maker.³

On the same principle, it has been held, in England, where an accommodation acceptor was sued by a *bona fide* holder, that as he ought to have paid it when demanded, he could not recover the costs against the party who had improperly indorsed it to the holder.⁴ So, also, the acceptor of a bill with funds who has failed to pay, is not liable for the costs of a suit against the drawer.⁵ And the indorser of a bill is not liable for the costs of a suit by the holder against the acceptor, nor for commissions paid on the collection of the money.⁶ In like man-

¹ *Simpson v. Griffin*, 9 Johns. 131. See also *Steele v. Sawyer*, 2 M'Cord, 459; and *Richardson v. Presnall*, 1 M'Cord 192, to the same point as *Simpson v. Griffin*.

² *Merritt v. Benton*, 10 Wend. 116.

³ *Morgan v. Reintzel*, 7 Cranch 273.

⁴ *Bleaden v. Charles*, 7 Bing. 246.

See this case commented on in *Asprey v. Levy*, 16 M. & W. 851; *Roach v. Thompson*, M. & M. 487.

⁵ *Barnwell v. Mitchell*, 3 Conn. 101.

⁶ *Bangor Bank v. Hook*, 5 Me. 174. [Disapproved in *Hargous v. Lahens*, 3 Sandf. 213.]

ner the indorser of a regular bill who has been sued by an indorsee, is not entitled to recover from the acceptor his costs in such action.¹ But a party who makes or indorses or accepts an accommodation bill or note is regarded as a surety, and can charge the party for whose benefit his signature is given with the costs of a suit for the collection of such note or bill if he be compelled to pay it. So the accommodation acceptor of a bill who is sued, can recover his costs of the drawer.² And so it has been held between the accommodation indorser of a note and the maker.³ **

§ 706. Conflict of laws.—When a bill of exchange is protested for non-acceptance or non-payment, the drawer is liable to damages according to the law of the place where it was drawn.^(a) If suit is brought in a foreign State, and there is no proof offered of the law where the bill is drawn, the law merchant prevails, and re-exchange is recovered.^(b) In an action against an indorser the measure of damages is governed by the law of the place where the indorsement was made.^(c) The allowance of interest is governed by the law of the place of payment.^(d)

¹ Dawson v. Morgan, 9 B. & C. 618. Baker v. Martin, 3 Barb. 634; and see

² Jones v. Brooke, 4 Taunt. 464. *post*, ch. xxvi, Of Contracts of Indem-

³ Hubby v. Brown, 16 Johns. 70; nity.

(a) *In re* Commercial Bank of S. Australia, 36 Ch. D. 522; Bank of U. S. v. United States, 2 How. 711; Crawford v. Branch Bank at Mobile, 6 Ala. 12; Kuenzi v. Elvers, 14 La. Ann. 391; Price v. Page, 24 Mo. 65; Cowperthwaite v. Sheffield, 1 Sandf. 416.

(b) *Ex parte* Heidelberg, 2 Low. 526; Hazelhurst v. Kean, 4 Yeates 19; Lennig v. Ralston, 23 Pa. 137. In Alabama it has been held that in the absence of proof of the foreign law no damages can be recovered. Dickinson v. Branch Bank of Mobile, 12 Ala. 54. In Louisiana the foreign law is presumed, in the absence of proof, to be the same as that of the forum: Kuenzi v. Elvers, 14 La. Ann. 391.

(c) Slacum v. Pomery, 6 Cranch 221; Cullum v. Casey, 9 Port. 131.

(d) Champant v. Ranelagh, Prec. Ch. 128; Cooper v. Waldegrave, 2 Beav. 282; Robinson v. Bland, 2 Burr. 1077; Bank of U. S. v. Daniel, 12 Pet. 32,

§ 707. **Damages for failure to accept or pay.**—We have seen that for breach of a *promise to pay* money, the face of the paper furnishes the measure of damages. But the rule is otherwise if the contract is a contract to accept or pay in the future. Here the plaintiff can recover substantial damages.^(*) In *Boyd v. Fitt*,^(b) the defendant failed to meet a draft of the plaintiffs, whereby the plaintiffs' business in Glasgow was suspended, their business in Dublin much injured, and they lost the agency of an Australian firm. The jury having given damages on each of these three heads, the verdict was sustained, the court holding that the suspension of the Glasgow trade was within both branches of the rule in *Hadley v. Baxendale*, and that the damages sustained under the other two heads of loss were within the rule in *Rolin v. Steward*,^(c) the natural result of the defendant's breach of contract. The extent of these damages it was for the jury to determine. In *Prehn v. Royal Bank of Liverpool* ^(d) the defendants, bankers at Liverpool, had agreed to accept the drafts of bankers at Alexandria. The defendants notified the plaintiffs that they could not meet their

54; *Scudder v. Union Bank*, 91 U. S. 406 (*seem*); *Price v. Teal*, 4 McLean 201; *Dunn v. Clement*, 2 Ala. 392; *Hunt v. Hall*, 37 Ala. 702; *Hawley v. Sloo*, 12 La. Ann. 815; *Healy v. Gorman*, 15 N. J. L. 328; *Foden v. Sharp*, 4 Johns. 183; *Scofield v. Day*, 20 Johns. 102; *Mullen v. Morris*, 2 Pa. St. 85; *Mills v. Wilson*, 88 Pa. 118; *Bain v. Ackworth*, 1 Mill 107; *McCandlish v. Cruger*, 2 Bay 377; *Cooper v. Sandford*, 4 Yerg. 452; *Cooke v. Crawford*, 1 Tex. 9; *Burton v. Anderson*, 1 Tex. 93; *Wheeler v. Pope*, 5 Tex. 262; *Andrews v. Hoxey*, 5 Tex. 171; *Able v. McMurray*, 10 Tex. 350; *Summers v. Mills*, 21 Tex. 77; *Austin v. Imus*, 23 Vt. 286. By the *lex loci contractus*: *Bailey v. Heald*, 17 Tex. 102. By the *lex fori*: *Grimshaw v. Bender*, 6 Mass. 157; *Ayer v. Tilden*, 15 Gray 178; *Ives v. Farmers' Bank*, 2 All. 236.

(*) *Marzetti v. Williams*, 1 B. & A. 415; *Rolin v. Steward*, 14 C. B. 595.

(b) 14 Ir. C. L. 43.

(c) 14 C. B. 595.

(d) L. R. 5 Ex. 92.

engagements. The latter were allowed to recover the commission they were obliged to pay another house to take up their bills, and also the expense of protesting the bills at Liverpool and Alexandria, and the expense of telegrams which they had despatched. In *Larios v. Bonany y Gurety*,^(*) a case appealed from the Supreme Court of Gibraltar, the plaintiffs had been allowed in that court to recover for the defendant's failure to accept a draft—1. The expense of protest; 2. Loss on some pork which he had been obliged to sell to get money; 3. Expenses of journeys to the place of trial, and expenses while at the trial; 4. General damages for injury to his personal credit, and for other loss. On appeal it was held that the plaintiff could not recover item 2, because that was too remote, such loss not being a natural consequence of the breach of contract. He was not allowed to recover item 3, for costs are a full indemnity. He was, however, allowed to recover items 1 and 4.^(b) In *Isley v. Jones*,^(c) an action for failure to accept a draft for the plaintiff's accommodation, it was held that the measure of damages was the inconvenience and loss which the plaintiff sustained from the defendant's offer to accept, and failure to do so.

§ 708. *Damages in cases of fraud and estoppel.*—In an action by the maker of a negotiable promissory note, against one who has wrongfully negotiated it, so as to render the maker liable upon it, the measure of damages is the amount of the note, and proof that the plaintiff has already paid the note is unnecessary.^(d) So where defendant, as plaintiff's agent, wrongfully issued bonds of the

(*) L. R. 5 P. C. 346.

(b) *Acc. Urquhart v. McIver*, 4 Johns. 103.

(c) 12 Gray 260.

(d) *Decker v. Mathews*, 12 N. Y. 313.

plaintiff, the market value of the securities could not be shown. The defendant was, however, allowed to show the plaintiff's inability to pay the bonds.^(*) In an action to recover the damages sustained by the plaintiff by the act of the defendant in fraudulently transferring to him a promissory note, as a valid and subsisting demand, when it had been in fact previously paid and cancelled, the measure of damages is, *prima facie*, the amount of the note and interest. The ability of the maker to pay the note will be presumed, until the contrary is proved.^(b) Where one is estopped from denying his signature to a note, as where he has adopted the signature knowing it to be a forgery, the general rule will apply, and the measure of the damages will be the whole amount of the note.^(c)

(*) *Western R.R. Co. v. Bayne*, 75 N. Y. 1.

(b) *Foust v. Gregg*, 68 Ind. 399; *Neff v. Clute*, 12 Barb. 466.

(c) *Casco Bank v. Keene*, 53 Me. 103; so in case of the signature of an indorser: *Fall River Nat. Bank v. Buffinton*, 97 Mass. 498.

CHAPTER XXIV.

THE MEASURE OF DAMAGES ON CONTRACTS OF INSURANCE.

I.—MARINE INSURANCE.

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| § 709. Marine insurance a contract of indemnity. | § 715. One-third new for old. |
| 710. Total loss. | 716. Exceptions to rule of indemnity. |
| 711. Constructive total loss. | 717. General average. |
| 712. Measure of loss on open policy. | 718. Proximate cause and consequential loss. |
| 713. Valued policy. | 719. Reduction of damage. |
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II.—FIRE INSURANCE.

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| § 720. Fire insurance a contract of indemnity. | § 724. Consequential loss. |
| 721. Measure of loss. | 725. Damages affected by the title. |
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III.—LIFE INSURANCE.

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| § 729. Life insurance not a contract of indemnity. | § 731. Accident insurance. |
| 730. Refusal to issue or continue a policy. | 732. Assessment policies. |

MARINE INSURANCE.

§ 709. Marine insurance a contract of indemnity.—* Marine insurance is defined to be a "contract of indemnity in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured all losses, not exceeding a certain amount, that may happen to the subject insured, from the risks enumerated or im-

plied in the policy, during a certain voyage or period of time."¹

In England this contract retains more nearly its original and proper character as a contract of indemnity measured by the actual loss; but in the United States it has been very materially modified by the introduction of various arbitrary rules, among which the most prominent are the deduction of "one-third new for old,"² the doctrine of abandonment for constructive total loss, and the principles adopted in the settlement of general averages. There is no branch of the law in which the rule of compensation has been made so much to yield to that of arbitrary remuneration, if it may be so called—in other words, the principle analogous to that of the *Lex Aquilia* of the Roman law, by which, instead of an inquiry into the exact circumstances of the particular case, a fixed rate or proportion is determined by which the recovery in all instances is governed.

The losses for which the insurer becomes liable fall under one of these three heads:

Partial loss;
Total loss; or
General average.**

§ 710. **Total loss.**—* A total loss occurs where the thing insured is physically destroyed or rendered valueless; (*) or where, under the doctrine of constructive losses, the deterioration is so great as to authorize the insured to abandon and demand payment as for an actual physical total loss.**

¹ Duer on Marine Insurance, vol. 1, p. 58; *Hamilton v. Mendes*, 2 Burr. 1198, 1210. ² This is, however, common to the English system.

(*) *Insurance Co. v. Fogarty*, 19 Wall. 640; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204.

In some of the early cases *actual destruction* was said to be necessary to enable the insured to recover for a total loss;(*) but the rule now is as just stated. So, if goods are by perils of the sea reduced to such a condition that they could not be restored to the assured in their original character, at the original place of their destination, this is a total loss.(b) Where there is an entire loss of any separate part of the cargo there is a total loss of that portion of the cargo; so where a number of mules were insured, and some of them were lost, the recovery was for a total loss of that portion of the property insured, and the case being that of a valued policy the recovery was of a proportionate amount of the whole valuation.(c)

§ 711. **Constructive total loss.**—* In case of total loss, it has been settled that the assured can abandon to the underwriters, and claim payment of the sum insured. This doctrine was not introduced into the law of insurance until long after the contract was familiarly known to commerce, and is very differently applied in different commercial countries. In the United States, whenever upon a disaster taking place, the thing insured, after making the deduction of one-third new for old, is found to be damaged more than half its value, the assured can abandon to the underwriters and claim a total loss. In other words, instead of being entitled to a compensation for the actual damages sustained, he may recover the whole value of his interest at risk. This rule, in a modified form, prevails in France, and generally on the con-

(a) *Navone v. Haddon*, 9 C. B. 30; *Depeyster v. Sun M. I. Co.*, 17 Barb. 306.

(b) *Navone v. Haddon*, 9 C. B. 30.

(c) *Brooke v. Louisiana S. I. Co.*, 16 Mart. 640, 681; *acc. Harris v. Eagle Fire Co.*, 5 Johns. 368.

tinient ; but the English law firmly maintains the more salutary doctrine that no abandonment can be sustained unless the thing assured is injured to its full value.** Where goods insured on a valued policy are shipped for sale, and after a constructive total loss they are abandoned to the insurer and sold, the expense of the sale must be borne by the insurer. (*)

§ 712. **Measure of loss on open policy.**—The measure of loss on an open marine policy is the actual value of the property lost. Thus where an insured vessel is lost, the value and not the cost of the vessel is recoverable ; (b) and where the market value was depressed through temporary causes it was held that the jury was not restricted to such market value, but might find a higher actual value. (c) In arriving at the value of a cargo, the insurance premium, commissions and charges are to be added to the invoice price at the loading port. (d)

The recovery upon an open policy is not restricted to the actual value of the property lost; the owner may also recover the necessary expenses of laboring for the safety and recovery of the vessel. (e) Where a vessel met with a partial loss, was repaired, proceeded on her voyage, and met with a total loss, not only the value of the vessel, but also the expense of the repairs may be recovered. (f) A general custom to pay the gross and not the net amount of freight on an open policy has been held good, though it affords more than complete indemnity. (g)

(a) *Portsmouth Ins. Co. v. Brazee*, 16 Oh. 81.

(b) *Snell v. Delaware Ins. Co.*, 4 Dall. 430.

(c) *McCuaig v. Quaker City Ins. Co.*, 18 Up. Can. Q. B. 130.

(d) *Usher v. Noble*, 12 East 639; *Louisville M. & F. I. Co. v. Bland*, 9 Dana 143, 157; *Minturn v. Columbian Ins. Co.*, 10 Johns. 75.

(e) *McBride v. Marine Ins. Co.*, 7 Johns. 431; as, in case of a captured vessel, legal expenses in the prize courts, *Lawrence v. Van Horne*, 1 Cai. 276.

(f) *Le Cheminant v. Pearson*, 4 Taunt. 367.

(g) *Palmer v. Blackburn*, 1 Bing. 61.

§ 713. **Valued policy.**—The open marine policy has been almost superseded by the valued policy, in which the amount to be paid upon total loss is liquidated.^(*) The agreed valuation is recovered upon a total loss, notwithstanding the market value has risen or fallen between the valuation and the loss.^(b) In case of a valued policy upon cargo or freight, there is sometimes a total loss before the cargo has been entirely loaded, or after part has been discharged. Where a valued policy is issued on cargo it has finally been decided to mean that cargo which the vessel is intended to carry, not such goods as may form the whole load at a particular moment; consequently when a total loss happens after part of the cargo has been taken on or discharged the valuation is opened and the actual loss recovered.^(c) So where there is a valued insurance on freight, and only part of the cargo has been taken on at the time of loss, the valuation will be opened, though it is proved that a full return cargo would have been secured.^(d)

§ 714. **Partial loss.**—Partial loss is, as its name implies, a partial destruction of the thing insured. In adjusting a partial loss, it is estimated by the relative value of sound and damaged goods at the port of delivery, taking the value in the policy or the invoice price as the basis, without reference to the rise and fall in the market.^(*) Re-

(*) "A 'valued policy' is not understood to be one which estimates the value of the property insured merely, but which values the loss, and is equivalent to an assessment of damages in the event of a loss." Agnew, J., in *Lycoming Ins. Co. v. Mitchell*, 48 Pa. 367, 372.

(b) *Portsmouth Ins. Co. v. Brazee*, 16 Oh. 81.

(c) *Tobin v. Harford*, 13 C. B. N. S. 791; 17 C. B. N. S. 528; overruling *Shawe v. Felton*, 2 East 109.

(d) *Forbes v. Aspinall*, 13 East 323. But the court added that the valuation could have been recovered if the whole cargo had been shipped, though the voyage had not yet begun.

(*) *Lewis v. Rucker*, 2 Burr. 1167; *Usher v. Noble*, 12 East 639.

turn duties received by the owners of the goods from the custom house should not be deducted from the amount to which the insurers are to contribute.^(*) Upon an open policy the whole amount of the risk may be recovered upon a partial loss, if the actual loss reaches that amount.^(b)

§ 715. *One-third new for old.*—* In regard to partial losses, the allowance of *one-third new for old* is the most important arbitrary limitation of the amount of relief which usage has engrafted on the policy. In case of a partial loss on the ship, the underwriters are nominally liable on the face of their contract to pay for the actual damage sustained. But it is considered that where old timbers or other materials are replaced by new, the vessel, when repaired, is better than she was before the damage was sustained. And, accordingly, it is held that the assured must himself bear a part of the expense of the repairs.¹ Mr. Justice Story has said that if the difference between the value of the vessel before the damage and after the repairs, “were to be ascertained in every particular case by actual inspection and estimates, there would be no end to controversies; and, therefore, general usage, which the law follows as founded on public convenience, has applied a certain rule to all cases.”² This rule is “that the assured shall pay one-third part of the expense of labor and materials requisite to make the repairs, and shall recover only two-thirds of the underwriters, it being considered that in general the ship is better by the amount of one-

¹ Phillips on Insurance, 2d ed., vol. ii, p. 197.

² Peele v. Merchants' Ins. Co., 3 Masson 27, 73.

(*) Cory v. Boylston Ins. Co., 107 Mass. 140.

(b) American Ins. Co. v. Griswold, 14 Wend. 399. 458.

third of the expense of the repairs. This allowance is called the deduction of *one-third new for old*.¹

The Supreme Court of Massachusetts, speaking of this rule, have said that it "is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which he is entitled by the policy, and to no more. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss without first repairing the damage done or estimating the cost of repairs."²*** The rule does not apply to a first voyage. (*)

§ 716. **Exceptions to rule of indemnity.**—* The American policies on vessels generally contain a declaration, that "no partial loss, or particular average, shall in any case be paid unless amounting to five per cent." or some similar clause; and the cargo policies have an analogous provision, defining the extent of the underwriters' liability. By these clauses it will be seen that in a large class of cases no partial loss whatever is to be paid, and in others, none unless amounting to a certain portion of the whole value insured. In the former case, to found a claim for recovery, the subject at risk must be totally lost. And as to what constitutes a total loss, many very interesting cases have been decided. But this inquiry is foreign to our present subject. It is only necessary to observe, that unless the injury comes up to the limit fixed by the policy, the insured can claim no damages; he can have no remuneration or compensation for any loss less than that required by the contract. (°) **

¹ Phillips on Insurance, 2d ed., vol. ii, p. 197; *Poingdestre v. Royal Exchange, Ry. & M.* 378. ² *Brinley v. National Ins. Co.*, 11 Met. 195.

(°) *Fenwick v. Robinson*, 3 C. & P. 323.

(°) The Irish Court of Admiralty has applied this rule to the claims of seamen for clothing lost by a marine collision. *The Cumberland*, 5 L. T. R. 496.

§ 717. **General average.**—* General average, or contribution in general average, is that sum which on any sacrifice of a part of the interests at risk for the joint benefit of all, becomes due from the other parties to the adventure to make up for the sacrifice.**

* The interests generally in jeopardy in these cases are the vessel, freight, and cargo; and when the sacrifice is to be made good in general average, the values of these subjects are to be arrived at as forming the basis of computation.** Although there has until recently been some want of precision in the rule on the subject of contribution by the cargo, owing chiefly to the false assumption that "prime cost," "invoice price," and "market value" were synonymous and convertible terms,(*) it is now practically settled in the United States, that in estimating a loss under an open policy, the rule of damages or insurable interest is the *market value* of the vessel or goods at the beginning of the risk, ascertained according to the rate of exchange at that time, together with the premium of insurance, and in the case of goods, the expenses necessarily incurred upon them at the time of shipment.(b) In England the insurable interest under open policies is now said to be its worth *to the assured* at the outset of the risk, with the expenses of insurance.(c)

* The vessel and freight are of more fluctuating and uncertain value. The actual worth of the vessel diminishes during the voyage with each day's wear and tear; and the value of the freight is also diminishing by reason of the wages, provisions, and expenses, which are in a con-

(*) Gahn v. Broome, 1 Johns. Cas. 120; Marshall on Ins., 5th ed., pp. 502, 503; Coffin v. Newburyport Mar. Ins. Co., 9 Mass. 436.

(b) 2 Phil. on Ins., §§ 1221, 1222, 1229, 1231; Carson v. The Marine Ins. Co., 2 Wash. C. C. 468; Warren v. Franklin Ins. Co., 104 Mass. 518; Cox v. Charleston Fire & Mar. Ins. Co., 3 Rich. 331.

(c) 1 Arnould on Mar. Ins. (6th ed.), p. 318.

stant state of disbursement to earn it. In New York, to arrive at the value of the vessel, one-fifth of its value at the time of sailing is deducted; and the freight contributes on one-half, and is contributed for on the whole.¹ And this principle of arbitrary valuation, though the rate or proportion may differ, prevails, we believe, universally throughout the United States.^{1**} Where there is a total loss of part of the freight, as in the case of a ship being too damaged on the voyage to return, the loss must be estimated on the value of the ship and freight, and not that of the freight only.^(*)

Goods contribute on their actual net value; that is, on their market price at the port of adjustment, free of all charges for freight, duty, and expenses of landing. But in a case where the goods brought at the intermediate port more than they would have done at the port of destination, the court, *per* Abbott, C. J., refused to set aside the valuation which had been adopted, which was the price actually obtained.^(b) Where the insured has been forced to make contribution in respect of an average loss, the insurers are held for that proportion of the contribution which the value of his interest as assured bears to its value as estimated for the purposes of contribution. Where a quantity of rails shipped at London for Bombay for a sum to be paid in advance at London, ship lost or not, were insured for a sum which included the freight, by a policy in which they

¹ This was the rule laid down in the case of *Leavenworth v. Delafield*, 1 Cal. 573, and has been acted on ever since. The principle has been somewhat shaken by Judge Betts in the District Court of the United States. *The Mutual Safety Ins. Co. v. The George, Olcott* 157, to which here, however, it

is only necessary to call attention thus briefly.

² So it is held that the contributory value of freight in general average is to be ascertained by a deduction of one-third of the gross freight. *Humphreys v. Union Ins. Co.*, 3 Mason 429.

(*) *Moss v. Smith*, 9 C. B. 94.

(b) *Richardson v. Nourse*, 3 B. & Ald. 237.

were warranted free from particular average, unless the ship should be "stranded, sunk, or burnt," and the ship escaped these perils, but sustained a constructive total loss, and the rails were saved and forwarded to their destination, for which the assured was compelled to pay freight to an amount not exceeding the value of the rails, this freight was held not recoverable on the policy.^(*)

* It may be proper to add, that this arbitrary remuneration has been greatly extended by the general adoption in this country of the practice of valuation. It has become habitual to value the thing assured in the policy; and these valuations fix the basis of recovery, and forbid inquiry into the actual damage sustained, unless the overestimate is so great as to induce a belief of fraud.^(b) **

§ 718. **Proximate cause and consequential loss.**—The law of Marine Insurance, which in the plan of this book is touched on but lightly, is full of nice questions both as to consequential damages and proximate cause, the latter generally involving the right of action, the former the limits of recovery. Where a vessel is injured by a peril of the sea, and further injury occurs from the master's neglect to have her repaired; where, in the case of an insurance on cargo, the ship is lost and the goods are saved, but are afterwards partially lost in consequence of the master's neglect to tranship them; and generally, where the master's neglect is the immediate cause by which the injury, although arising from a peril insured against, produces the damage, the insurers are

(*) *Great Indian P. R. Co. v. Saunders*, 1 B. & S. 41.

(b) *Irving v. Manning*, 6 C. B. 391; *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513. See as to adjustment of general average in various cases, *Meeker v. Klemm*, 11 La. Ann. 104; *Greely v. The Tremont Insurance Company*, 9 Cush. 415; *Nelson v. Belmont*, 5 Duer 310; *Lee v. Grinnell*, *Ibid.* 400; *Nimick v. Holmes*, 25 Pa. 366.

not liable.^(*) So where the vessel was wrecked in time of war, and the cargo would have been saved but for the interference of hostile troops, the loss was held to be due to war, and not to a peril insured against.^(b) But if the loss was a remote consequence only of the negligence of the master or crew, but a direct one of a peril insured against, the underwriters are not discharged.^(c) So a collision is a peril within a policy insuring against the perils of the sea, and the insured may recover the damage which was the immediate consequence of it, although the vessel was brought within the peril by the fault of the master or crew.^(d) But the underwriters in such a case are not liable to pay the owners of the insured vessel the damages which the latter have been compelled to pay the owners of the other vessel to avoid being sold.^(e) And where a policy on a boat excepts from the perils insured against, perils and misfortunes arising from a want of ordinary care and skill in lading or navigating her, the fact that the master placed her in a dangerous position for being towed, is material in determining the insurer's liability.^(f) A boat insured struck a rock and sank. The insurers were sued. The wages and provisions of the crew, during the detention, were

(*) *Hazard v. New England M. I. Co.*, 1 Sumn. 218; *Cleveland v. Union Ins. Co.*, 8 Mass. 308; *Copeland v. New England M. I. Co.*, 2 Met. 432; *Schieffelin v. New York Ins. Co.*, 9 Johns. 21.

(b) *Ionides v. Universal M. I. Co.*, 14 C. B. N. S. 259.

(c) *American Ins. Co. v. Bryan*, 26 Wend. 563, 583.

(d) *General M. I. Co. v. Sherwood*, 14 How. 351; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Street v. Augusta Ins. Co.*, 12 Rich. 13. These cases establish the present rule on the point, and those of *Peters v. Warren Ins. Co.*, 14 Peters 99; *Hale v. The Washington Ins. Co.* 2 Story 176; *Nelson v. The Suffolk Ins. Co.*, 8 Cush. 477, which are in conflict with it, can no longer be regarded as of general authority.

(e) *Mathews v. Howard Ins. Co.*, 11 N. Y. 9.

(f) *Savage v. Corn Exchange Ins. Co.*, 4 Bosw. 1.

not allowed to be estimated as a part of the damages.^(a) In Massachusetts, the plaintiff is allowed to recover on his insurance policy the damages paid to another vessel for injury by the collision. The plaintiff's vessel having been held liable in a foreign court of admiralty for the injury, the plaintiff and the owner settled the damages between themselves. Although the insurers had no notice of the suit, they were held liable for this amount, but not for interest for time previous to filing the writ.^(b) The obligation of the insurer, in cases of partial loss, is simply to pay such loss. It does not extend to consequential losses, nor to loans obtained in a foreign port for repairs, though the expense of raising the money on bottomry is part of the partial loss which he must pay.^(c) The rule as to consequential damages has been said to be different in admiralty from what it is at common law.

§ 719. *Reduction of damage.*—* We have already had occasion to notice, that though the plaintiff's loss had been made good by charitable contributions, his claim for legal relief is not thereby prejudiced ; and there are other cases where he has been allowed remuneration beyond his positive loss. So, it is no defense to an action for a partial loss on a policy of marine insurance, that the expense of the repairs for the amount of which the loss is claimed was covered by a loan made by the correspondent of the owner on a bottomry of the vessel, and that the bottomry loan was realized by such correspondent, after the subsequent total loss of the vessel, out of an insurance effected by him on his bottomry interest, and that no part of the loan was ever paid by the owner.¹ ** But

¹ *Read v. Mutual Safety Ins. Co.*, 3 Sandf. 54.

(a) *May v. Delaware Ins. Co.*, 19 Pa. 312.

(b) *Thwing v. Great Western Ins. Co.*, 111 Mass. 93 ; *contra*, *Mathews v. Howard Ins. Co.*, 11 N. Y. 9.

(c) *Bradlee v. Maryland Ins. Co.*, 12 Pet. 378.

where a loss occurs under a valued policy, the plaintiff can only recover the difference between the amount he has received from other insurances and the agreed value.^(*) And where upon an actual total loss the sale of the hulk produced a certain sum, that sum is to be deducted from the valuation.^(b)

FIRE INSURANCE.

§ 720. *Fire insurance a contract of indemnity.*—* When we turn to the subject of fire insurance, we find that the policy retains much more nearly its original character as a contract of indemnity. In this branch of the great business of insurance, the practice of valuation is almost everywhere unknown ; the doctrine of abandonment has never been introduced ; and the right to recover depends, in all cases, on the actual loss sustained,^(c) to be proved in the particular instance.¹ **

Any evidence conducing to show the loss less than that claimed, is admissible. The doctrine relative to reduction of damages has no application to such a case.^(d) A fire insurance company which insured goods, and the government tax on the same, has been held liable for the amount of that tax, although not paid, where the government had entered judgment and the insured had given bonds for payment. These bonds were given in Kentucky, where they operate under the statutes as satisfaction of the judgment. It was held not to be an answer

¹ An interesting discussion of some fire, will be found in the opinion of important points on the measure of Jones, C. J., in *Laurent v. Chatham* damages in cases of insurance against F. I. Co., 1 Hall 41.

(*) *Bruce v. Jones*, 1 H. & C. 769.

(b) *Smith v. Manufacturers Ins. Co.*, 7 Met. 448.

(c) *Illinois M. F. I. Co. v. Andes Ins. Co.*, 67 Ill. 362.

(d) *Franklin F. I. Co. v. Hamill*, 6 Gill 87.

to say that the government could not have collected the tax if the insurers had refused to defend the suit.^(*)

On a fire insurance policy the whole amount of the loss is recovered, up to the amount of the risk, though the loss is only partial.^(b) And where several buildings, or goods in several buildings, are insured in one policy, the whole loss incurred by the destruction of one building may be recovered, up to the amount of the risk.^(c) By a statute of Wisconsin^(d) the sum named in the policy is taken as the value of the property at the time of loss. This makes every policy in that State a valued policy, and the whole risk is payable upon total loss.^(e) And where there are several concurrent policies, by consent of the several insurers, the several amounts named are payable.^(f)

§ 721. Measure of loss.—* In Ireland, the general rule in cases of fire insurance has been thus laid down in a case where a mill and machinery were injured by fire. The court directed the jury to say, "what state of repairs the machinery was in, what it would cost to replace it by new machinery, and how much better, if at all, the mill in which the machinery was placed would be with the new machinery than it was at the time of the fire; the difference to be deducted from the entire expense of placing

(*) *Insurance Co. v. Thompson*, 95 U. S. 547.

(b) *Liscom v. Boston M. F. I. Co.*, 9 Met. 205; *Underhill v. Agawam M. F. I. Co.*, 6 Cush. 440; *Mississippi M. I. Co. v. Ingram*, 34 Miss. 215; *Phoenix F. I. Co. v. Cochran*, 51 Pa. 143.

(c) *Nicolet v. Insurance Co.*, 3 La. 366; *Wallace v. Insurance Co.*, 4 La. 289; *Commonwealth v. Hide & L. I. Co.*, 112 Mass. 136; *Rix v. Mutual Ins. Co.*, 20 N. H. 198.

(d) Stat. 1874, ch. 347; R. S. § 1943.

(e) *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; *Thompson v. St. Louis Ins. Co.*, 43 Wis. 459.

(f) *Oshkosh Gas Light Co. v. Germania F. I. Co.*, 71 Wis. 454.

there such new machinery.”¹ This rule has been adopted in this country in cases where the property is injured and repaired so as to replace it substantially as it was before the accident.² But in cases of total destruction much confusion once existed.

Mr. Greenleaf has said,³ that the actual loss is to be ascertained by the expense of restoring the property, without any deduction for the difference of value between the old and new materials; and, on the other hand, an effort was made in Massachusetts, in a suit on a fire policy, to introduce the analogies of marine insurance; the defendants insisting on deducting from the estimated cost of a new building, the difference in value between the old and such new building. The property had been totally destroyed, and a different building had been erected on the premises. In this case both these rules were rejected; the court saying as to the latter, with great justice, that it was not supported by any authority or principle. They also refused to sanction the principle laid down by Mr. Greenleaf, saying that, if it were followed, the assured in some cases would recover more than an indemnity, and much more when the building is dilapidated and out of repairs; that the underwriters are liable only to pay a fair indemnity for the loss; and that, whatever the rule might be when the building insured is partially injured by the peril assured against, it has no application to cases like the present, where the building is totally destroyed and to be replaced by a new one; and they proceeded to say: “If the rule laid down in *Vance v. Forster* were applied, the jury must ascertain by the estimates and opinions of witnesses the amount of the expenses of a new building, and they must esti-

¹ *Vance v. Forster*, 1 Irish Circ. Cas. 47; 3 Stephens' N. P. 2084.

² *Brinley v. The National Ins. Co.*, 11 Met. 195.

³ 2 Greenleaf on Ev. § 407.

mate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate; for when the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless. We are, therefore, of opinion that there is no rule of damages applicable to the present case; and that, in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception." And a new trial was ordered.¹ **

§ 722. *Actual value of the property lost.*—But this case is not any longer to be considered as expressing the law, even in Massachusetts. The measure of damages is now recognized as a question for the court. The general rule is the value of the property at the time of the fire.^(*) The amount of the risk is not even *prima facie* evidence of the extent of loss.^(b) Where a house is destroyed, the measure of damages is not its cost originally or to rebuild, nor its value if removed, nor the difference in value of the land with and without it. The value of the house itself, as it stood on the land just before its destruction, is the measure of damages; which is to be arrived at by comparing its value with that of a new house of the same size and kind.^(c) Nor is the measure of damages affected by the fact that, in accordance with a contract between the plaintiff and a third party, the building

¹ *Brinley v. The National Ins. Co.*, 11 Met. 195.

(*) *Fowler v. Old North State Ins. Co.*, 74 N. C. 89.

(b) *Lion F. I. Co. v. Starr*, 71 Tex. 733.

(c) *State Ins. Co. v. Taylor*, 14 Col. 499; *Aetna Ins. Co. v. Johnson*, 11 Bush 587.

was soon to be removed, and its value for removal was less.^(*)

Upon partial loss of a building the measure of damages is the difference between the value of the property whole and damaged.^(b) A wooden building was injured by fire. A city ordinance forbade repairs on wooden buildings situated where the one in question was; and without repairs the injury was greater than the risk, though the building could have been repaired for a less sum. It was held that the amount of the risk could be recovered.^(c) Where, by the terms of a policy of insurance upon goods contained in the public stores, the underwriters agreed to make good to the assured, all such loss as should happen to the goods by fire, "to be estimated according to the true and actual cash value of the property at the time the loss should happen," the measure of damages was such value, notwithstanding the duties upon the goods had not been paid or secured.^(d) So where a distiller is liable for the tax on whiskey destroyed in bond, the measure of damages is the value including the tax.^(e) Where by law or by the terms of the policy only a certain proportion of the total value of property is to be insured, that proportion is to be determined by the value at the time of the loss, and not by the value stated in the policy.^(f)

The measure of damages is not, however, always or necessarily equal to the market value of the property. "The contract of the insurer is not that, if the property is

(*) *Washington M. E. M. Co. v. Weymouth & B. M. F. I. Co.*, 135 Mass. 503.

(b) *Hoffman v. Western M. & F. I. Co.*, 1 La. Ann. 216.

(c) *Brady v. North Western Ins. Co.*, 11 Mich. 425.

(d) *Wolfe v. Howard Ins. Co.*, 7 N. Y. 583.

(e) *Hedger v. Union Ins. Co.*, 17 Fed. Rep. 498.

(f) *Post v. Hampshire M. F. I. Co.*, 12 Met. 555; *Atwood v. Union M. F. I. Co.*, 28 N. H. 234; *Huckins v. Peoples' M. F. I. Co.*, 31 N. H. 238.

burned, he will pay its market value; but that he will indemnify the assured, that is, save him harmless, or put him in as good a condition, so far as practicable, as he would have been in if no fire had occurred." (°)

§ 723. **Election of insurer to rebuild—Alternative contract.**—It is a frequent provision in fire policies, that in case of loss the insurers, instead of paying it in money, may rebuild or repair the premises, on giving notice to the insured of their election to do so. The policy is in this respect an alternative contract, and the exercise of the election, by giving the notice, converts the contract of insurance into a building contract; and in case the rebuilding is thereupon begun and discontinued by the insurance company, the rule of damages is no longer the amount insured, but that necessary to complete the rebuilding. And where several companies have given the notice, and the contract thus substituted is broken by all, the insured can recover against any one of them the whole cost of completing the restoration of the building, leaving the company against whom the judgment is recovered to obtain contribution from the others. (°) Where the company elects to rebuild, and after waiting some time refuses to do so, the insured may recover under the policy what it would have cost the company to rebuild at the date of refusal, together with damages for injury to the property through the exposure. (°)

In Illinois in such a case, it has been held that the plaintiff may recover the amount of insurance with interest plus the rent of the land during the period of delay; (°) but this rule loses sight of the fact that the con-

(°) Morton, C. J., in *Washington M. E. M. Co. v. Weymouth & B. M. F. I. Co.*, 135 Mass. 503, 506.

(°) *Morrell v. Irving F. I. Co.*, 33 N. Y. 429.

(°) *American C. I. Co. v. McLanathan*, 11 Kas. 533.

(°) *Home M. F. I. Co. v. Garfield*, 60 Ill. 124.

tract, by the election of the company, has become a contract to rebuild. If the repairs are made in good faith, but do not make the building equal in value to the original structure, the difference in value between the building before loss and as repaired is the measure of damages.^(*) Upon a partial loss the insurer elected to reinstate; but the public authorities condemned the building for causes apart from those insured against, and removed it. The insurer, notwithstanding the action of the authorities, was held bound to reinstate, which in this case practically compelled them to pay for a total loss.^(b) Where there is no clause in the policy giving the insurer the right to rebuild, no such right exists.^(c)

§ 724. *Consequential loss.*—The damages for delay in payment are confined to interest on the amount from the time of the demand. A finding of greater damages is error.^(d) But where no demand is made for payment, nor notice of loss given, the company is not liable to pay interest except from the time of the filing of the writ.^(e) The necessary expenses of the insurers in rescuing the insured property were allowed them, and also their expenses in selling it, where such a sale was necessary, although without notice to the owners, where the owners were not known and no circumstances indicated who they were.^(f) Rent during the period of rebuilding, or

(*) *Parker v. Eagle F. I. Co.*, 9 Gray 152.

(b) *Brown v. Royal Ins. Co.*, 1 E. & E. 853. It would seem that the company would be called upon to pay the whole value of the building, even if it were greater than the risk; for having elected to reinstate, the owner became entitled to a building equal in value to the one destroyed.

(c) *Wallace v. Insurance Co.*, 4 La. 289.

(d) *Insurance Co. v. Piaggio*, 16 Wall. 378. In this case the court modified the judgment by striking out a clause giving a large sum for delay. See 17 U. S. Stat. at Large 197; *Ellmaker v. Franklin Ins. Co.*, 5 Pa. St. 183.

(e) *Thwing v. Great Western Ins. Co.*, 111 Mass. 93.

(f) *Robinson v. Corn Exchange Ins. Co.*, 1 Abb. N. S. 186.

loss of use during that time, cannot be recovered unless especially stipulated for in the policy.^(*)

In a peculiar case in New York the defendant insured from loss by fire the plaintiff's royalties, accruing under an exclusive license to use the plaintiff's patent for refining oil. The manufactory of the licensee was destroyed by fire. The measure of recovery was held to be the loss of royalties caused by loss of use of the works during rebuilding, not merely the loss of royalties on the oil destroyed.^(b)

§ 725. **Damages affected by the title.**—Any person having a legal interest in property may insure it, and recover the whole loss up to the amount of insurance, holding the balance (if any) above his interest for the benefit of the equitable or legal owner of it. So a life tenant^(c) or an unpaid vendor^(d) may recover the whole amount of loss. The insurable interest of a lessee for years, however, is the value of his lease, and that is the measure of his recovery.^(e)

A mortgagor who insures recovers the whole amount of loss,^(f) and so does the mortgagee who insures in connection with the mortgagor.^(g) Where the mortgagee insures without the privity of the mortgagor, he is in some jurisdictions restricted to the amount of the loan

(*) *In the matter of Wright and Pole*, 1 A. & E. 621; *Pontalba v. Phoenix Ass. Co.*, 2 Rob. (La.) 131; *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, 122 Pa. 37.

(b) *Natural F. O. Co. v. Citizens' Ins. Co.*, 106 N. Y. 535.

(c) *Caldwell v. Stadacona F. & L. I. Co.*, 11 Can. 212.

(d) *Collingridge v. Royal Exchange Ass. Corp.*, 3 Q. B. D. 173; *Insurance Co. v. Updegraff*, 21 Pa. 513.

(e) *Niblo v. North American F. I. Co.*, 1 Sandf. 551.

(f) *Carpenter v. Providence W. I. Co.*, 16 Pet. 495 (*semble*); *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40.

(g) *Kernochan v. New York B. F. I. Co.*, 17 N. Y. 428.

unpaid at the time of loss ;^(*) in others he is allowed to recover the whole value of the property.^(b) He is generally required to surrender his mortgage to the insurer.^(c) If, after the destruction of the property, the mortgagee has foreclosed the mortgage, it has been said that he can recover only such an amount, besides what he got on the foreclosure sale, as would indemnify him.^(d) A bailee—for instance, a consignee or commission agent—may insure and recover the whole value, holding the balance over his own interest for the owner.^(e) A fire policy on goods described generally as “the property of the insured or held by him in trust,” covers cloth of other parties left with him to be made into clothing, and extends to the whole value of such goods. It is not limited to the bailees’ interest or lien for charges.^(f) Warehousemen and wharfingers with whom goods are deposited have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance, and the insurers are entitled in such a case to recover from the insurance office the full value of the goods destroyed by fire. They are, of course, liable to account to the true owners for the excess of the money received beyond the amount of their own charges

(*) *Carpenter v. Providence W. I. Co.*, 16 Pet. 495; *Sussex Ins. Co. v. Woodruff*, 26 N. J. L. 541.

(b) *Honore v. Lamar F. I. Co.*, 51 Ill. 409; *Concord U. M. F. I. Co. v. Woodbury*, 45 Me. 447; *King v. State M. F. I. Co.*, 7 Cush. 1.

(c) *Carpenter v. Providence W. I. Co.*, 16 Pet. 495; *Honore v. Lamar F. I. Co.*, 51 Ill. 409; *Sussex Ins. Co. v. Woodruff*, 26 N. J. L. 541; *contra* in Massachusetts: *King v. State M. F. I. Co.*, 7 Cush. 1.

(d) *Hadley v. Insurance Co.*, 55 N. H. 110.

(e) *Hough v. People's F. I. Co.*, 36 Md. 398; *De Forest v. Fulton F. I. Co.*, 1 Hall 84.

(f) *Stillwell v. Staples*, 19 N. Y. 401.

in respect of such goods.^(a) If in such case the owner has also insured, according to the rule of the United States courts, the loss should be apportioned between the companies. In such a case the adjustment of the loss by experts is admissible evidence to determine what contributions should be made.^(b)

§ 726. *Reduction of damages.*—In an action on a fire policy, by which the defendants were to pay, in case of loss, all damages not exceeding \$2,500, to be estimated according to the cash value of the property at the time of the loss, but at the rate of two-thirds only of such cash value, the insured were held entitled to the whole \$2,500, as that sum was less than two-thirds of the cash value of the property destroyed. The court sustained the refusal of the judge at Nisi Prius to charge “that as plaintiffs had another policy to the amount of \$2,500, issued by another company on said goods, one-half the entire loss should be found by the jury, and the Ashland Company (the defendants) could be legally charged with only two-thirds of such one-half, and interest.”^(c) But, under a policy of fire insurance for \$2,000, on property insured elsewhere for \$3,000, which contained the following provisions: “When property is insured by this company solely, three-fourths only of the value will be taken; and in cases of loss this company will be liable to pay three-fourths only of the value at the time of the loss, but in no case more than is insured by this company. In case of loss or damage of property on which authorized double insurance subsists, this company shall be liable to pay only such proportion thereof as the sum insured by this company bears to the whole amount in-

(a) *Waters v. Monarch F. & L. Ass. Co.*, 5 E. & B. 870.

(b) *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

(c) *Ashland F. I. Co. v. Housinger*, 10 Oh. St. 10.

sured thereon, such amount to exceed three-fourths of the actual value of the property at the time of the loss," the plaintiff was held, by the Supreme Court of Massachusetts, entitled to recover only two-fifths of three-fourths of the loss.^(*) Where a mortgagee insures property, his recovery is not affected by the fact that the mortgagor has repaired the premises.^(b)

§ 727. **Loss of insurance through defendant's default.**—Where a defendant had agreed to procure insurance for the plaintiff, but before the insurance was effected, the property was destroyed in the Chicago fire of 1872, it was held that the defendant was not liable for the face value of the policy, that he was only liable for the amount of dividends which the company would have declared on a policy of that face value.^(c) Where a policy lapsed through the negligence of the defendants (not the insurers), the plaintiff recovered the net value of the policy at the time.^(d)

§ 728. **Reinsurance.**—An insurer frequently finds it advisable to secure protection from loss by reinsuring in another insurance company. The insurer still remains liable upon the original contract, but is indemnified against loss by the reinsurer. Upon a loss happening, the original insurer, upon a principle that will be discussed in a later chapter, may at once sue the reinsurer and recover the amount of the loss, without first having paid it.^(e) It has been held that this may be done even

(*) *Haley v. Dorchester M. F. I. Co.*, 12 Gray 545.

(b) *Foster v. Equitable M. F. I. Co.*, 2 Gray 216.

(c) *Chicago Building Society v. Crowell*, 65 Ill. 453.

(d) *Grindle v. Eastern Express Co.*, 67 Me. 317.

(e) *Eagle Insurance Co. v. Lafayette Insurance Co.*, 9 Ind. 443; *Gantt v. American Central Ins. Co.*, 68 Mo. 503; *Blackstone v. Alemannia F. I. Co.*, 56 N. Y. 104. See ch. xxvi.

if the insurer is insolvent and unable to pay the claim.^(*) But if the insurer has adjusted the loss without suit, he can recover no more than the amount he has paid.^(b) Upon claim being brought against the insurer, notice may be given to the reinsurer, whose duty it then becomes either to contest the claim or to adjust it.^(c) In a case of this sort ^(d) Story, J., said :

“If notice of a suit, threatened or pending, upon the original policy, be given to the reassurers, they have a fair opportunity to exercise an election whether to contest or admit the claim. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party reassured to compromise or settle it, they must be deemed to require that it should be carried on ; and then, by just implication, they are held to indemnify the party reassured against the costs and expenses necessarily and reasonably incurred in defending the suit.

“If they decline to interfere at all, or are silent, they have no right afterwards to insist that the costs and expenses of the suit ought not to be borne by them, as they are exclusively under such circumstances incurred for the benefit of the reassurers, and are indispensable for the protection of the party reassured.”

The Supreme Court of Missouri, after quoting this language with approval, added : ^(e)

“Such defense when made in good faith, for the protection of the reinsurers, will render any judgment obtained by the original assured in such suit, binding upon the reinsurers, as to all matters which could have been litigated therein, and make them liable also for the costs and expenses of the litigation. It necessarily follows that in all cases where the reinsurers fail, after notice, to participate in the defense, the original insurer, by operation of law, becomes *sub modo* their agent for the manage-

(*) *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137.

(b) *Illinois Mut. F. I. Co. v. Andes Insurance Co.*, 67 Ill. 362.

(c) *New York C. I. Co. v. National Protection I. Co.*, 20 Barb. 468.

(d) *N. Y. State Marine Ins. Co. v. Protection Ins. Co.*, 1 Story 458, 462.

(e) *Gantt v. American Central Ins. Co.*, 68 Mo. 503, 535, *per* Hough, J.

ment of such defense, and in the conduct thereof is bound to exercise the utmost good faith : and any judgment against him, collusively obtained, would not support a recovery over against the reinsurers."

LIFE INSURANCE.

§ 729. *Life insurance not a contract of indemnity.*—*Contracts of assurance on lives form another very important division of this branch of our subject. Where the policy was taken out on the life of a third person, it was originally said that, like marine and fire policies, it was a mere contract of indemnity ; (*) that if not damnified, the plaintiff could not recover ; and so, where the creditors of Mr. Pitt had effected an insurance on his life, and their debts had been subsequently paid, it was held that they could not recover.¹ But this case has been overruled ; and it has been decided that a contract of life assurance is a mere contract to pay a certain sum of money upon the death of a person, in consideration of the payment of certain premiums ; that it is not a contract of indemnity ; (b) and that the termination of a creditor's interest before the death does not defeat the recovery.² (c) **

The sum insured is the measure of damages.^(d) There may be more than one beneficiary ; for instance, a debtor may insure his life in the name of a creditor, the balance after paying the debt to inure to the benefit of the debtor's family.^(e)

¹ *Godsall v. Boldero*, 9 East 72, cited, with approbation, in *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. 507.

² *Dalby v. India & London Life Assurance Co.*, 15 C. B. 365.

(a) *Bevin v. Connecticut M. L. I. Co.*, 23 Conn. 244.

(b) *Acc. Trenton M. L. & F. I. Co. v. Johnson*, 24 N. J. L. 576, 585.

(c) *Law v. London I. L. P. Co.*, 1 K. & J. 223 ; *Rawls v. American M. L. I. Co.*, 27 N. Y. 282.

(d) *Hoyt v. New York L. I. Co.*, 3 Bosw. 440.

(e) *American L. & H. I. Co. v. Robertshaw*, 26 Pa. 189.

§ 730. **Refusal to issue or continue a policy.**—Where an insurance company breaks a contract to issue a paid-up policy, the measure of damages is the cost of reinsuring in a first-rate company, or if the plaintiff is not insurable at the time, the value of the policy.^(a) So where a company agrees, on the payment of the third annual premium due on a life insurance policy, to issue a paid-up policy and fails to do so, the measure of damages is the difference in value between a paid-up policy and the life policy held by the plaintiff.^(b) But it has been held in some cases that if the company breaks the conditions of its policy the measure of damages is not what it would cost the plaintiff to reinsure, but the whole amount of the premiums paid by him with interest ;^(c) but since these premiums represent the consideration paid by the insured and not the value of the contract, it would seem that they do not furnish the measure of damages. If the plaintiff cannot be reinsured, it is added in one case, he should get “full damages, not exceeding the amount of insurance.”^(d)

Upon breach of the policy by the insurer transferring its business to another company and going out of business, the assured may recover the value of the policy.^(e) In determining the value, the health of the assured, if it is a life policy, and all other facts tending to show what it would cost him to replace himself, should be taken into

(a) *Phoenix M. L. I. Co. v. Baker*, 85 Ill. 410; *Missouri V. L. I. Co. v. Kelso*, 16 Kas. 481; *Union C. L. I. Co. v. McHugh*, 7 Neb. 66; *Speer v. Phoenix M. L. I. Co.*, 36 Hun 322; *Farley v. Union M. L. I. Co.*, 41 Hun 303. So in an action for conversion of a policy: *Barney v. Dudley*, 42 Kas. 212.

(b) *American L. I. & T. Co. v. Shultz*, 82 Pa. 46.

(c) *Alabama G. L. I. Co. v. Garmany*, 74 Ga. 51; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383.

(d) *Union C. L. I. Co. v. Poettker*, 4 Am. Law Rec. 109.

(e) *Lovell v. St. Louis M. L. I. Co.*, 111 U. S. 264.

account. The items which go to make up the value of a policy were considered in *N. Y. Life Insurance Co. v. Statham*.^(*) The assured had, in that case, been prevented by the war of the rebellion from paying the premiums. It would seem that if the war did not excuse the non-payment, the policy should, according to its terms, have lapsed. If the war excused the non-payment, then it would seem that the policy must have been in force at the time of the death of the assured, but the Supreme Court took a different view, holding that the plaintiff could recover the equitable value of the policy at the time of the first default, with interest from the close of the war, and that there should be no deduction as in the case of surrendered policies. As to the method of determining the value, the court said: "In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation." In case of a mutual insurance company the reserve fund for the policy under consideration must be considered in determining its value.^(b) Where the defendant refused to receive the premium for a policy on account of the breaking out of the war, the plaintiff residing in Virginia (the offer to pay the premium being made before the proclamation of non-intercourse with that State), it was held that the subsequent enlistment of the plaintiff in the Confederate army did not annul the contract, and that the measure of his damages was the value of the policy at the time of refusal, with interest.^(c)

§ 731. **Accident insurance.**—The same principle which prevents recovery for loss of rents in case of fire insurance prevents recovery for loss of time or of profits in

(*) 93 U. S. 24.

(b) *Nashville L. I. Co. v. Mathews*, 8 Lea 499.

(c) *Smith v. Charter Oak L. I. Co.*, 64 Mo. 330.

an action on an accident insurance policy. The risk insured against is physical accident, compensation for which is the expense of curing the injury and the pain of it. So where in a suit on a policy of insurance, by which £1,000 was to be paid to the representatives of the assured, in case of his death by railway accident, and a proportionate part of that sum to him in case of his injury by such accident, the injury had fallen short of death, it was held not to be a true measure of damages to assume the sum insured as the value of the life, and to estimate a proportionate sum for the injury. In such a case, the measure of damages is the amount of injury the plaintiff has sustained as a *direct consequence* of the accident, *i. e.*, compensation for the pain and medical expense; but loss of time or profits in such a case are not regarded.^(*) Pollock, C. B., said:

“We think that, in considering the damage done to the traveller, the consequential mischief of losing some profit is not to be taken into consideration; otherwise, a passenger whose time or business is more valuable than that of another would for precisely the same personal injury receive a greater remuneration than that other. What the insurance company calculate on indemnifying the party against is the expense and pain and loss immediately connected with the accident, and not remote consequences that may follow according to the business or profession of the passenger.”

§ 732. **Assessment policies.**—Where an assessment insurance company, which pays, in case of loss, the whole or part of an amount levied upon its members by assessment, refuses to levy an assessment to pay the plaintiff's claim, the plaintiff may maintain an action at law against the company, and recover the amount assessable on policy-holders up to the amount of his claim,

(*) *Theobald v. Railway P. A. Co.*, 10 Ex. 45, 57.

unless the company alleges and proves that a less amount would have been paid in by the policy-holders. (*)

In *O'Brien v. Home Benefit Society*, (b) Earl, J., said :

“ The plaintiff was entitled to recover something, and what was the measure of his damages ? Just what he lost by the defendant's breach of its contract. He was entitled to have an assessment made and collected, and the proceeds thereof paid to him. What was the contract worth to him, and what would the assessment have produced for him ? It was incumbent upon the plaintiff to give evidence which would enable the jury to answer these questions. As the assessment was not made, it was impossible for the plaintiff to show accurately or precisely what such an assessment would have produced. He was bound to give such evidence as the nature of the case permitted bearing upon the matter of damages, and legitimately tending to prove their amount.”

The reason for allowing the plaintiff to recover substantial damages is that, although it is not in his power to establish what would have been paid in, the presumption is, nothing appearing to the contrary, that the money would have been collected.

(*) *Lueders v. Hartford L. I. Co.*, 4 McCr. 149; *Lawler v. Murphy*, 58 Conn. 294; *Covenant M. B. Assoc. v. Hoffman*, 110 Ill. 603; *Elkhart M. A. Assoc. v. Houghton*, 103 Ind. 286; *Kansas Protective Union v. Whitt*, 36 Kas. 760; *Burland v. Mutual Benefit Assoc.*, 47 Mich. 424; *Bentz v. Northwestern Aid Assoc.*, 40 Minn. 202; *Taylor v. National Temperance R. Union*, 94 Mo. 35; *O'Brien v. Home Benefit Society*, 117 N. Y. 310; *Freeman v. National Benefit Society*, 42 Hun 252. *Contra*, that only nominal damages can be recovered : *Newman v. Covenant Mutual Benefit Association*, 72 Ia. 242.

(b) 117 N. Y. 310, 319.

CHAPTER XXV.

MEASURE OF DAMAGES IN ACTIONS ARISING OUT OF SALES OF PERSONAL PROPERTY.

I.—BREACH BY VENDOR.

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| <p>§ 733. Introductory.
734. General rule.
735. Reason for it generally given doubtful.
736. Failure to deliver stock.
737. Time when market value is to be taken.
738. Place where market value is to be taken.
739. Nearest market.
740. Price receivable on sub-contract.
741. Avoidable loss.</p> | <p>§ 742. Consequential loss.
743. Waiver.
744. Payment in advance.
745. The rule of higher intermediate value followed in some jurisdictions.
746. The rule disapproved in other jurisdictions.
747. Distinction between stock and merchandise.
748. No just distinction.
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BREACH BY VENDOR.

§ 733. *Introductory.*—* We now approach the consideration of a large class of cases falling under the head of the common-law action of *assumpsit*,—that of contracts for the sale of chattels or personal property. These contracts may be broken, either completely, by the vendor's neglect to deliver the article, or by the vendee refusing to pay the price; or partially, by the article proving different from some warranty made in regard to it at the time of sale. Generally, it may be said that these agreements furnish their own measure of damages; in other words, that courts of justice, without desiring to fix any arbitrary rate of remuneration, endeavor solely to carry into effect the contract of the parties; and to this rule the only exception that can be said to exist is that in regard to agreements of an unconscionable and oppressive character, which we have already considered.¹***

§ 734. *General rule.*—* We have first to consider the cases arising from the failure of the seller to perform his agreement. When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of

¹ § 612.

the article at the time when ** and the place where it should have been delivered, with interest. (*)

It follows from this rule, that if, at the time fixed for the delivery, the article has not risen in value, the vendee having lost nothing can recover only nominal damages. (b) Accordingly, where goods are sold, and it is agreed that the market price shall be paid for them, damages for non-

(*) *Peterson v. Ayre*, 13 C. B. 353; *O'Neill v. Rush*, 12 Ir. L. 34; *Marsh v. McPherson*, 105 U. S. 709; *Barnard v. Conger*, 6 McLean 497; *Halsey v. Hurd*, 6 McLean 102; *Gilpin v. Consequa*, Pet. C. C. 85; *Harralson v. Stein*, 50 Ala. 347; *Bozeman v. Rose*, 51 Ala. 321; *Bell v. Reynolds*, 78 Ala. 511; *Haas v. Hudmon*, 83 Ala. 174; *Clements v. Beatty*, 87 Ala. 238; *Crosby v. Watkins*, 12 Cal. 85; *Bullard v. Stone*, 67 Cal. 477; Cal. Code, §§ 3308, 3354; *Cole v. Cheovenda*, 4 Col. 17; *McAllister v. Douglas*, 1 D. C. (1 Cr. C. C.) 241; *Southwestern R.R. Co. v. Rowan*, 43 Ga. 411; *Smith v. Dunlap*, 12 Ill. 184; *Deere v. Lewis*, 51 Ill. 254; *Driggers v. Bell*, 94 Ill. 223; *Loescher v. Deisterberg*, 26 Ill. App. 520; *Gatling v. Newell*, 12 Ind. 118, 125 (*semble*); *Zehner v. Dale*, 25 Ind. 433; *Frink v. Tatman*, 36 Ind. 259; *McColum v. Huntington*, 51 Ind. 229; *Fell v. Muller*, 78 Ind. 507; *Rahm v. Deig*, 121 Ind. 283; *Cannon v. Folsom*, 2 Ia. 101; *Boies v. Vincent*, 24 Ia. 387; *Jemison v. Gray*, 29 Ia. 537; *Osgood v. Bauder*, 75 Ia. 550; *Faulkner v. Closter*, 79 Ia. 15; *Gray v. Hall*, 29 Kas. 704; *Miles v. Miller*, 12 Bush 134; *Koch v. Godshaw*, 12 Bush 318; *Marchesseau v. Chaffee*, 4 La. Ann. 24; *Thompson v. Howes*, 14 La. Ann. 45; *Bush v. Holmes*, 53 Me. 417; *Kribs v. Jones*, 44 Md. 396; *Pinckney v. Dambmann*, 19 Atl. Rep. 450 (Md.); *Shaw v. Nudd*, 8 Pick. 9; *Bartlett v. Blanchard*, 13 Gray, 429; *Essex M. Co. v. Pacific Mills*, 14 All. 389; *Chadwick v. Butler*, 28 Mich. 349; *McKercher v. Curtis*, 35 Mich. 478; *Northrup v. Cook*, 39 Mo. 208; *Harrison Wire Co. v. Hall & W. H. Co.*, 97 Mo. 289; *Davis v. Shields*, 24 Wend. 322; *McKnight v. Dunlop*, 5 N. Y. 537; *Dana v. Fiedler*, 12 N. Y. 40; *Parsons v. Sutton*, 66 N. Y. 92; *Windmuller v. Pope*, 107 N. Y. 674; *Billings v. Vanderbeck*, 23 Barb. 546; *Yorke v. Ver Planck*, 65 Barb. 316; *Brock v. Knower*, 37 Hun 609; *Norton v. Wales*, 1 Robt. 561; *Beals v. Terry*, 2 Sandf. 127; *Fessler v. Love*, 43 Pa. 313; *White v. Tompkins*, 52 Pa. 363; *Culin v. Woodbury Glass Works*, 108 Pa. 220; *Davis v. Richardson*, 1 Bay 105; *Doak v. Snapp*, 1 Coldw. 180; *Harris v. Rodgers*, 6 Heisk. 626; *Randon v. Barton*, 4 Tex. 289; *Duncan v. McMahan*, 18 Tex. 597 (*semble*); *Day v. Cross*, 59 Tex. 595; *Guice v. Crenshaw*, 60 Tex. 344; *Smith v. Snyder*, 82 Va. 614 (*semble*); *Sweeney v. Jamieson*, 2 Wash. 254; *Hill v. Chipman*, 59 Wis. 211; *Feehan v. Hallinan*, 13 Up. Can. Q. B. 440.

(b) *Faulkner v. Closter*, 79 Ia. 15; *Currie v. White*, 6 Abb. (N. S.) 352, 386.

delivery are only nominal ;^(*) and the same is true where the price of the goods is by the contract to be fixed by appraisers at the time of delivery.^(b) The plaintiff sold the defendant a slave, with an agreement that if the defendant wished to sell the slave, the plaintiff should have the privilege of repurchasing at the price paid by the defendant. The defendant sold the slave to a third party. The measure of damages was the difference between the market value of the slave at the time of the sale to the third party and the agreed price.^(c)

The reason of the rule is usually said to be that this is the plaintiff's real loss, because with this sum he can go into the market and supply himself with the same article from another vendor.¹ ^(d) The rule applies where there is a delivery of part only of the goods contracted for.^(e) Where the vendor puts it out of his power to fulfil his contract of sale by selling a portion of the goods to a third party before the time stipulated for the delivery, the vendee in an action for the breach of the contract is entitled to the difference between the market value and the contract price, on all the goods contracted to be sold, and not merely those which the vendor had thus put it out of his power to deliver ;^(f) for the entire contract was broken by the vendor's act. The vendee could not be

¹ *Dey v. Dox*, 9 Wend. 129; *Davis* *lop*, 5 N. Y. 537; *Owen v. Routh*, 14 v. Shields, 24 Wend. 322; *Beals v. C. B.* 327. *Terry*, 2 Sandf. 127; *McKnight v. Dun-*

(*) *Wire v. Foster*, 62 Ia. 114.

(b) *Koch v. Godshaw*, 12 Bush 318.

(c) *Brent v. Richards*, 2 Gratt. 539.

(d) *Josling v. Irvine*, 6 H. & N. 512; *Clark v. Dales*, 20 Barb. 42; *Belden v. Nicolay*, 4 E. D. S. 14. And if he can supply himself at a less price than the market price, the measure of damages is the difference between that price and the contract price. *Harrison Wire Co. v. Hall & W. H. Co.*, 97 Mo. 289.

(e) *Valpy v. Oakeley*, 16 Q. B. 941.

(f) *Crist v. Armour*, 34 Barb. 378.

required to accept part only of the goods. Where the defendant contracted to deliver his crop of corn growing on about 30 acres of ground in merchantable order at a stipulated time and price, and one-fourth of the crop only turned out sound, and he refused to deliver that portion only, but insisted on delivering the whole, if any, it was held a breach of the contract, and the vendees were held entitled to recover the difference between the contract price and the market value of the merchantable corn on the ground.^(*) Where the goods are delivered after the time fixed by the contract, but are accepted by the purchaser, the latter is entitled to recover the difference in the market value of the goods at the time when they should have been delivered and when they were delivered.^(b)

§ 735. Reason for it generally given doubtful.—It has been so often said that the reason for the rule is as just stated—that the plaintiff's loss is measured by the market value of the article; because for this sum he can *replace himself*,—that it is with great hesitation that we venture to make even a suggestion to the contrary; but it must be said that an explanation given in an English case frequently cited to another point seems much simpler, and much more in accordance with principle. In *Startup v. Cortazzi* ^(c) it was intimated that the reason of the rule is that the market value represents what the plaintiff *would have got on a resale*, that is, the true value of his bargain. This does not mean that he buys necessarily for a resale; but that what the article would bring in any one's hands on a resale, is that value to

^(*) *Hamilton v. Ganyard*, 34 Barb. 204.

^(b) *Whalon v. Aldrich*, 8 Minn. 346; *Boomer v. Flagler*, 51 N. Y. Super. Ct. 211.

^(c) 2 C. M. & R. 165.

which he is entitled. The notion of a general practice of replacement is objectionable for a variety of reasons. In the first place, it does not correspond to the facts. A person failing to receive an article bought can be under no absolute duty to society or his vendor to replace himself, nor can it be said that it is so universally done that it is an expected act from one in such a position. But in the second place, if it were, and the doctrine of replacement were supposed to be an invariable rule of law, how are we to explain the rule that the law measures the damages at the very instant of breach? Is it to be supposed that at the very instant of breach every one who has made a contract is in the market ready to replace himself? If not, the rule, if founded on the reason given, ought to be the difference between the contract and the market price within a reasonable time after notice for replacement. But outside of a few jurisdictions which have established such a rule in contracts of a peculiar character, (*) we know of no authority for it.

The doctrine of replacement has undoubtedly a peculiar fitness in one class of sales or agreements for the future delivery of articles—where the defendant has notice of a sub-contract which makes it necessary that the plaintiff should replace himself. But we think that the repeated assertion that the reason of the rule of damages in sales is that the purchaser can go into the market and replace himself has a tendency to breed confusion in the whole subject.

§ 736. **Failure to deliver stock.**—In case of a refusal to deliver stock which is to be paid for, the measure of damages is governed by the same principles. (b) * So in an action for the non-delivery of railway shares on a given

(*) See chapter on Higher Intermediate Value.

(b) *Van Allen v. Illinois C. R.R. Co.*, 7 Bosw. 515.

day,¹ pursuant to contract, the property not having been paid for, the measure of damages is the difference between the contract price and the market price on the day when the contract was broken.^(*) So the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover as damages for the non-delivery the difference between the price agreed on and the market price on the day on which the defendant refused to complete the sale, and that only. He is not entitled to damages in respect to an advance of price taking place afterwards at the time of the actual issue of the scrip. In other words, the time when the defendant refused to comply with his contract is the determining point.^{1**}

§ 737. Time when market value is to be taken.—The plaintiff recovers the value at the time the contract should have been performed. Where the defendant agreed to deliver wood *as needed* and subsequently repudiated the contract, the plaintiff was allowed to recover the value of the wood at the different times it was needed, and was not confined to the price at the time of the repudiation.^(b) * A doubt may arise as to what is the time stipulated for delivery. Where oats were to be delivered "on or about" a certain day, it was held that the plaintiff was not limited to the difference between the contract price and the market value on the precise day named, but might recover the difference between the contract price and the market value within a reasonable time after that

¹ *Shaw v. Holland*, 15 M. & W. 136.

¹ *Tempest v. Kilner*, 3 C. B. 249.

^(*) *Acc. Tayloe v. Turner*, 2 D. C. (2 Cr. C. C.) 203; *Vance v. Tourné*, 13 La. 225; *Rand v. White M. R.R. Co.*, 40 N. H. 79; *Jones v. Chamberlain*, 30 Vt. 196.

^(b) *Long v. Conklin*, 75 Ill. 32.

day.¹ ** Where delivery was to be on demand, the market value is to be taken at the time of demand.³ In a case in Massachusetts, the contract was, that George should deliver to Quarles 1,000 barrels of flour at \$6 per barrel, at any time within six months—George to give Quarles six days' notice prior to delivery; Quarles to pay the price aforesaid, and either party to be released, if desiring it, within three months, on paying \$500 to the other. This last provision was not taken advantage of. On the 13th of February, Quarles demanded it; it was not delivered; and the question was, on what day the damages were to be computed, it being agreed that such damages were the difference between the price mentioned in the contract and the actual value. The court held that the defendant had to do the first act, *i. e.*, give notice; that he had still six days before the 14th of February to give notice; and as, if he had then given notice, he would have had till the last day to deliver the flour, the actual breach by the non-delivery of the flour must be taken to have occurred on that day, and damages were computed accordingly.⁴ If no time is fixed for the delivery, it has been said in Maryland that damages will be calculated from the period at which the defendant refuses to perform.^(*) But the general rule is that, if no time is fixed for delivery, the article is deliverable in a reasonable time. What such time is must depend on the circumstances of each case; and the difference between the stipulated price and the price at the time proper for the delivery is the measure of damages.^(b) If growing crops are sold, the value is to be calculated at the time when

¹ *Kipp v. Wiles*, 3 Sandf. 585.

³ *Quarles v. George*, 23 Pick. 400.

⁴ *Smith v. Berry*, 18 Me. 122.

(*) *Williams v. Woods*, 16 Md. 220.

(b) *Thompson v. Woodruff*, 7 Coldwell 401.

they are mature and ready for delivery.^(a) If the delivery is postponed by an agreement between the parties, the measure of damages is the difference between the contract and market price at the time the article is deliverable by the subsequent agreement.^(b) When the time of delivery is postponed indefinitely, the measure of damages would seem to be the difference between the contract price, and the market value at a reasonable time after demanding performance.^(c) Where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time each delivery should have been made. So where a contract is for the delivery of goods in equal proportions in a given number of months, and the action for non-delivery is brought after the period stipulated for the last delivery, the proper measure of damages is the sum of the differences between the contract and market prices on the last day of each month respectively.^(d) And where in such a case the contract was repudiated by the defendant, and the action was brought and tried before the expiration of the stipulated number of months, it was held (in the absence of evidence on the part of the defendant, that the plaintiffs could have obtained a new contract to reduce their loss), that the true measure of damages was the sum of the differences between the contract price and the market price, at the several periods fixed for delivery; the breach being treated by the court as final.^(e)

(a) *Smock v. Smock*, 37 Mo. App. 56; *Harris v. Rodgers*, 6 Heisk. 626.

(b) *Ogle v. Vane*, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; *Tyers v. Rosedale & F. I. Co.*, L. R. 8 Ex. 305 (*per* Martin, B.); L. R. 10 Ex. 195; *McDermid v. Redpath*, 39 Mich. 372.

(c) *Hickman v. Haynes*, L. R. 10 C. P. 598; *Tyers v. Rosedale & F. I. Co.*, L. R. 10 Ex. 195.

(d) *Brown v. Muller*, L. R. 7 Ex. 319; *Brock v. Knowler*, 37 Hun 609.

(e) *Ex parte Llansamlet T. P. Co.*, L. R. 16 Eq. 155; *Roper v. Johnson*, L. R. 8 C. P. 167; *Tyers v. Rosedale & F. I. Co.*, L. R. 8 Ex. 305; L. R. 10 Ex. 195.

§ 738. Place where market value is to be taken.—The difference in value is to be taken at the *place* as well as time of delivery, when it can be there ascertained.^(*) This is the invariable rule if there is a market price at that place. So, even where the defendant had a monopoly of the coal market at the place where he had agreed to make the delivery, the market price at that place fixed the measure of damages, and it was held by the Supreme Court of the United States error to charge that the measure of damages was the cash value of the kind of coal mentioned at other towns near the place of delivery, “after deducting the contract price of the coal and the cost and expenses of transporting thither.” Bradley, J., said, that although the plaintiff would probably have received those prices, the rule was firmly established that the value at the place of delivery fixed the measure of damages.^(b) * So in New York, where assumpsit was brought for breach of a contract to deliver 100,000 shingles at a landing-place called Bailey Town, on Seneca Lake, on the 1st of June, 1828, for which the plaintiff was to pay \$125, or \$1.25 per thousand, the plaintiff proved the value of the shingles at the place of delivery on the day (1st of June) to have been \$1.87 or \$2.00 per thousand. The defendant was allowed to prove the value of shingles at Geneva *and other places*, and from an *average of prices* to find the value; but, the plaintiff moving for a new trial, this was held wrong, and that the true rule of damages was the difference between the price as fixed by the parties on the day and *at the place* of delivery and the market value at the same time and place; and a new

(*) Phelps v. McGee, 18 Ill. 155; Field v. Kinnear, 4 Kas. 476; White v. Salisbury, 33 Mo. 150; Schmertz v. Dwyer, 53 Pa. 335; Worthen v. Wilmot, 30 Vt. 555; Boyd v. Gunnison, 14 W. Va. 1.

(b) Grand Tower Co. v. Phillips, 23 Wall. 471.

trial was ordered.^{1**} Where cheese sold to the plaintiff had been warranted to be worth nineteen cents a pound in the New York market, and was proved to be worth there only twelve, proof that it was shipped to London and netted to the plaintiff, over all expenses, by sales made in the ordinary course of business, sixteen and a half cents a pound, was held inadmissible to reduce the damages.^(*)

§ 739. **Nearest market.**—On the principles stated in an earlier chapter,^(b) if there is no market value at the place of delivery, the true value of the goods at the time fixed for delivery is to be shown by the best evidence possible. If there is a neighboring market, the price at such market, with the cost of transportation thence, will usually furnish the measure of damages.^(c) If the goods were purchased for resale at another place, and there is no market at which others can be procured to send to that place, the difference between the market price at the place of resale and the contract price, plus the cost of transportation, may be recovered.^(d) It would seem that if the place of resale is not the nearest market, knowledge of the destination of the goods on the part of

¹ *Gregory v. McDowel*, 8 Wend. 435. In a case in Arkansas, in an action on an agreement by which Hanna sold Harter ten hogs, the defendant below refused to deliver, it was held that the measure of damages was the difference

between the price agreed on between the parties and the market price of the pork at the time of the delivery at the place fixed on by the agreement. *Hanna v. Harter*, in error, 2 Ark. 397.

(*) *Durst v. Burton*, 47 N. Y. 167.

(b) Chap. viii.

(c) *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Sellar v. Clelland*, 2 Col. 532; *Capen v. De Steiger G. Co.*, 105 Ill. 185; *Rice v. Manley*, 66 N. Y. 82. See § 246.

(d) *Johnson v. Allen*, 78 Ala. 387; *Louis Cook Mfg. Co. v. Randall*, 62 Ia. 244; *McCormick H. Co. v. Jensen*, 45 N. W. Rep. 160 (Neb.); *McDonald v. Unaka T. Co.*, 88 Tenn. 38; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619.

the seller should be proved,^(*) as otherwise the loss of the price at the place of resale would not be a natural consequence. Such knowledge is often shown by the fact that the goods were to be delivered to a carrier, to be forwarded to that place.^(b)

§ 740. Price receivable on sub-contract.—The rule in *Hadley v. Baxendale*, as generally understood, requires a notice of special damages to be given, or circumstances amounting to such notice to be within the contemplation of the parties, in order to enable a plaintiff to recover any other damages than the difference between the contract and the market price. Where a vendee, therefore, has, between the time of making the original contract and that limited for its performance, made a sub-contract for the resale of the goods at a higher price than the market rate at the time fixed for delivery under the original contract, he cannot recover for his loss of the profits he would have made by carrying out the resale.^(c) It has, however, been held that if there is no market price, the plaintiff can recover what he was to obtain on a sub-contract, if a usual one, less the contract price.^(d) The rule has been put on the ground that the sub-contract shows the value. Where the defendant had notice of a sub-contract or any special damages, which a plaintiff would suffer, such damages are undoubtedly recoverable.^(e) The notice must be given at the time of enter-

(*) *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619.

(*) *McCormick H. Co. v. Jensen*, 45 N. W. Rep. 160 (Neb.).

(*) *Williams v. Reynolds*, 6 B. & S. 495.

(*) *Borries v. Hutchinson*, 18 C. B. N. S. 445; *McKay v. Riley*, 65 Cal. 623; *Van Arsdale v. Rundel*, 82 Ill. 63; *Loescher v. Deisterberg*, 26 Ill. App. 520; *McHose v. Fulmer*, 73 Pa. 365.

(*) *Smeed v. Foord*, 1 E. & E. 602; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Borries v. Hutchinson*, 18 C. B. N. S. 445; *Benton v. Fay*, 64 Ill. 417; *Stewart v. Powers*, 12 Kas. 596; *Messmore v. New*

ing into the contract.^(a) There need be no notice of *the terms* of a sub-contract, unless the terms are exceptional.^(b) But there must be a notice of exceptional terms.^(c) If there is no notice the plaintiff can still recover an amount not to exceed what would usually result from the breach of contract.^(d)

§ 741. **Avoidable loss.**—In accordance with the principle, that the plaintiff should do the best he can to reduce the damages, he will not be allowed to recover damages which could have been avoided by the acceptance of a tender made by the defendant subsequently to the proper time of performance.^(e) So if it be readily in the power of the vendee to procure the article elsewhere, it is his duty to do so, and his damages in such case are limited to compensation for the delay and expense thereby sustained.^(f) Nor can he recover for any damages which are the result of his own carelessness. So where, on the defendant's failure, he purchased an inferior article and had it manufactured so as to perform a sub-contract he had entered into, he was not allowed to recover the expenses of sending the manufactured article to his vendee, who refused them, for he was not warranted in such a proceeding.^(g) But the defendant cannot reduce the damages by an offer to sell to the plaintiffs at a price below the market value on the day of delivery.^(h)

York S. & L. Co., 40 N. Y. 422 ; Heinemann v. Heard, 50 N. Y. 27 ; Laird v. Townsend, 5 Hun 107 ; Hammer v. Schoenfelder, 47 Wis. 455.

(a) Gee v. Lancashire & Y. Ry. Co., 6 H. & N. 211.

(b) Booth v. Spuyten Duyvil R. M. Co., 60 N. Y. 487.

(c) Horne v. Midland Ry. Co., L. R. 7 C. P. 583 ; L. R. 8 C. P. 131.

(d) Cory v. Thames I. W. & S. B. Co., L. R. 3 Q. B. 181.

(e) Parsons v. Sutton, 66 N. Y. 92. This rule, however, could not be applied if the plaintiff had already replaced himself in the market.

(f) Taylor v. Read, 4 Paige 561.

(g) McHose v. Fulmer, 73 Pa. 365.

(h) Havemeyer v. Cunningham, 35 Barb. 515.

§ 742. **Consequential loss.**—Allowances for consequential loss in addition to, or differing from the usual measure of damages, will be made or refused in accordance with the rule in *Hadley v. Baxendale*, the rule of avoidable consequences, and the other general principles affecting contracts. Where it is known to the seller that the goods were ordered by the buyer for a particular occasion, and were to be delivered in time for that occasion, and the contract is broken by the seller, and no time remains to the buyer after the breach to purchase similar goods elsewhere, the seller may be held for such damage as directly and naturally arises from the breach, although “beyond, to this extent, the difference between the contract and the market price.”^(a) So where the defendant failed to deliver bottles for essences manufactured by the plaintiff, the plaintiff’s loss in business through inability to bottle his essences is recoverable.^(b) In *Benton v. Fay*,^(c) a purchaser who gave notice of the object of his purchase was allowed to recover, for failure to send him a planing machine, a fair rent for the use of his buildings and other machinery, they being otherwise in running order during the time they lay idle in consequence of the defendant’s refusal to deliver the machine, but only for so long a time as was reasonably necessary to supply himself with another machine of similar character, after being advised of the defendant’s refusal to send the machine sold to him. The profits that might have been made were held not recoverable. But where goods were purchased as materials for manufacturing, there being no others in the market, and the nearest

(a) *Abbott v. Hapgood*, 150 Mass. 248; *Richardson v. Chynoweth*, 26 Wis. 656.

(b) *Culin v. Woodbury Glass Works*, 108 Pa. 220.

(c) 64 Ill. 417.

market was distant, and the cost of transportation enormous, it was held that the profits of manufacturing (the business being an established one) might be recovered.^(a) Where the defendant agreed to supply logs for the plaintiff's mill, the net profits to be divided between them, the plaintiff upon breach is entitled to recover the profits he would have realized.^(b) Where the defendant contracted to supply ornamental bricks for the front of a building and failed to do so, and no other bricks of the sort could be procured, damages were allowed for the lessened value of the building from the front being built with inferior bricks.^(c) Under a contract by the defendant to sell and deliver a large quantity of coal at a fixed price during a certain time, to be transported at the plaintiff's expense to their factory, it was held in an action to recover for a breach of the contract by delivering inferior coal, and in not delivering it till after the contract time, that the measure of damages for the inferior quality was the difference between the value at the factory of the coal called for by the contract, and that of the coal delivered; and the measure of damages for the failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance, and the average rates during the time covered by the contract, especially in the absence of evidence that the average rates were higher than the rates at the end of the contract period.^(d) If the plaintiff has incurred reasonable expenses, so as to prevent injurious consequences, he can recover them.^(e) The ex-

(a) *Equitable G. L. Co. v. Baltimore C. T. & M. Co.*, 65 Md. 73.

(b) *Robinson v. Bullock*, 66 Ala. 548; see § 193.

(c) *Sweeney v. Jamieson*, 2 Wash. 254.

(d) *Merrimack Manuf. Co. v. Quintard*, 107 Mass. 127.

(e) *Borries v. Hutchinson*, 18 C. B. N. S. 445; *Lalor v. Burrows*, 18 Up. Can. C. P. 321.

penses of delay, caused by reliance on the defendant's intention to perform, were held recoverable in *Grand Tower Co. v. Phillips*.^(*)

§ 743. **Waiver.**—Where a vendor has partly failed to comply with his part of the contract, yet if the vendee have received and made use of part of the property purchased, and is benefited by it, he must still pay for the property so received and used within the limit of the contract price, provided its value exceed the damage he has sustained from the failure to complete the contract.^(b) But the right to delivery of the full amount is not necessarily waived by accepting a partial delivery.^(c)

§ 744. **Payment in advance.**—* But a different case is presented where the purchaser has paid the price in advance, or has otherwise, as by the transfer of stock, been deprived of the use of his property; and here it has been insisted that the purchaser is not to be limited to the value of the article at the time of delivery, but shall have the advantage of any rise in the market value of the article which may have taken place up to the time of the trial; and on this point different and conflicting decisions have been made.** The ground of the latter rule is that the purchaser, having been deprived of the use of his property, is entitled to the best price he could have obtained for the article up to the time of the settlement of the question. The general question of the allowance of a higher intermediate value has already been discussed.^(d) It is only necessary here to examine the application of that rule in this particular case.

The application of this principle in the case now under

(*) 23 Wall. 471.

(b) *Koeltz v. Bleckman*, 46 Mo. 320.

(c) *Creighton v. Comstock*, 27 Oh. St. 548.

(d) See Chapter xv.

consideration was first made in some early English and New York cases.^(*) A case in New York frequently cited upon this point,^(b) was an action of assumpsit on a note, promising, for value received, to pay one hundred and fifty dollars in good salt, at one dollar and a half per barrel, to be delivered on the 15th of April then next.

* This the court held to be a contract to deliver salt, and decided that, as the goods had been paid for, the measure of damages was the difference between the contract price and the highest value at any time between the period for delivery and the day of trial; and Sutherland, J., said:

“ We hold it, therefore, to be settled by authority, and rightly settled upon principle, that where a contract is made for the sale and delivery of goods or chattels, and the price or consideration is paid in advance, and an action is brought upon the contract for the non-delivery, the plaintiff is not confined, in measuring his damages, to the value of the articles on the day when they should have been delivered. But we doubt the propriety of giving the vendee, *in all cases*, as a measure of damages, the highest price of the article between the day when it should have been delivered and the day of trial; *if he immediately, or without any unreasonable delay, commences and prosecutes his action*, we think it just and proper that the fluctuation in price should be exclusively at the hazard of the defendant, the plaintiff having done everything in his power to have the contract settled and adjusted, and which is prevented solely by the laches or default of the defendant. In such a case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made and the day of trial. But where he delays the prosecution of his claim beyond the period which may be considered reasonable for the purpose of endeavoring to make an amicable arrangement, he must be considered as

(*) *Shepherd v. Johnson*, 2 East 211; *Gainsford v. Carroll*, 2 B. & C. 624; *Cortelyou v. Lansing*, 2 Caines Cas. 200; *West v. Wentworth*, 3 Cow. 82.

(b) *Clark v. Pinney*, 7 Cow. 681, 695.

assenting to the delay, and ought to participate in the hazard of it. In such a case we are inclined to think the rule of damages should be the value of the article at the commencement of the suit.

"Whether this rule of damages would be applicable to contracts for the sale and delivery of individual articles, purchased for the use and accommodation of the vendee, and not for the purpose of sale, we express no opinion. The case at bar is evidently a contract for the purpose of trade and commerce, and to that class of cases we wish to be understood as at present confining our opinion.

"The consideration in this case is acknowledged to have been received at the time of making the contract. Whether it was in money or in anything else, is not, perhaps, material ; but the presumption of law is, that it was in money." **

* In Connecticut, it has been held that where the price is paid in advance, the advance at all events can be recovered without any investigation into the state of the market. In a case in that State, suit was brought on an agreement to deliver flour. The plaintiff paid part of the price in advance. At the time fixed for the performance, flour had fallen in price, and it was held that he was entitled to recover his advance with interest. It was admitted that where one contracts to deliver any article other than money, and fails to do it, the rule of damages is the value of the article at the time and place of delivery, with interest for the delay, because it is supposed that the party will have supplied himself elsewhere with the article at that price ; but it was held that this reasoning did not apply to a case where the defendant had violated his contract and retained the plaintiff's money without consideration.¹ In a case in the same State, on an agreement by the defendant to give a deed of certain land in considera-

¹ *Bush v. Canfield*, 2 Conn. 485. See an able dissenting opinion by Hosmer, J. This case presents, in fact, the question whether the loss by the depreciation of the article should fall on

the vendor or purchaser ; the court, in awarding to the plaintiff his advance and interest, really extricated him from a losing bargain.

tion of the transfer to him of a farm worth \$2,000, the defendant insisted that the plaintiff could only recover the value of the farm conveyed by him; and it was so held at the trial. But the rule that the value of the article at the time and place of delivery, and interest for delay, furnished the measure of damages, was again declared by the court. It was said "that the *consideration of a contract* is never the rule of estimating the damages for the breach of an express agreement"; and a new trial was granted.¹ ** The whole subject was, however, afterwards reviewed in that State, and the rule of allowing the *value of the goods at the time of trial* adopted,² the court saying "that it was founded upon principles of natural justice."

§ 745. The rule of higher intermediate value followed in some jurisdictions.—In England, in the *Nisi Prius* case of *Elliot v. Hughes*,^(*) the rule is approved by which the measure of damages for the non-delivery of goods paid for in advance is the difference between the price paid and the highest price up to the trial; but the case of *Startup v. Cortazzi* ^(b) seems opposed to this, and the law of England is said to be unsettled, except in the case of sale of stock, where the value at the time of trial is allowed.^(c)

The modification of the general rule in case of pay-

¹ *Wells v. Abernethy*, 5 Conn. 222, 227. "The reason of the rule," said Homer, C. J., "is so simple and obvious, that it has been universally embraced, except in cases of stock contracts; and the anomaly in such cases has arisen from the specific relief which chancery has been in the habit of giving, and which courts of law, not universally,

but in most instances, have in substance thought proper to pursue. Whenever a case on this subject occurs, I shall be desirous of putting an end to this exception without cause, by the establishment of perfect uniformity, as no just reason can be assigned for any discrimination."

² *West v. Pritchard*, 19 Conn. 212.

(*) 3 F. & F. 387.

(b) 2 C. M. & R. 165.

(c) *Mayne on Damages*, 4th ed., p. 179.

ment in advance is sanctioned in Indiana in regard to commercial transactions. In the case of *Kent v. Ginter*,^(*) the court, after stating that the ordinary rule for measuring damages in suits by the vendee against the vendor is the value of the property at the time and place of delivery, declare that one exception is well established in the case of stocks, and approve also those authorities which make a second exception in the case of the payment in advance for an article which is one of a class or quantity. In this case the vendee has two remedies: one to treat the contract as rescinded, and sue to recover the money paid, with interest; the other, to sue for damages which include, besides the value of the article at the time of the purchase, the benefit of its rise; whether this second exception extends to the case of a specific article, the title to which passed by the purchase, so that trover or replevin could be maintained for it, by the vendee, the court leaves undecided. In Pennsylvania it is held that where bank stock has been wrongfully withheld from a party entitled to it, the measure of damages, if the consideration for the stock has been paid, is "the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime"; but if the consideration "has not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock."^(b) Such also is the rule in California.^(c) In one case the court sustained an alternative instruction to the jury that they might find the amount

(*) 23 Ind. 1.

(b) *Bank of Montgomery v. Reese*, 26 Pa. 143; *acc. Musgrave v. Beckendorff*, 53 Pa. 310; *Kountz v. Kirkpatrick*, 72 Pa. 376.

(c) *Dabovich v. Emeric*, 12 Cal. 171.

of the purchase-money and interest, or the highest market price of the property to the time of trial.(*) *And in Texas, also, upon much consideration, the rule has been declared that, on breach of a contract to deliver chattels, where the purchase-money has been paid, the highest price at any time between the time appointed for delivery and the day of trial, and interest from the time appointed for delivery, is the true measure of damages.¹ (b) **

In the Supreme Court of the United States Chief-Justice Marshall intimated that this is the correct rule ;(c) but he spoke only for himself. The rule of higher intermediate value, as now modified in New York, has been recently adopted by that court in the case of breach of a broker's contract to carry stocks on a margin ;(d) but it is doubtful whether the rule would be extended by that court to the case of non-delivery of goods sold.

In Iowa the plaintiff has been allowed to recover the price of the goods when they were demanded, that being the highest price previous to the trial. When delivery should have been made, the price was much lower. The court, in that case stated the Iowa rule to be that the plaintiff could recover the highest price previous to the day of bringing suit, where not unnecessarily delayed.(e)

Where at the time of making a contract for the purchase of personal property *in futuro* a small sum was paid as earnest money, but was returned before the

¹ *Randon v. Barton*, 4 Tex. 289 ; *Calvit v. M'Fadden*, 13 Tex. 324.

(*) *Maier v. Riley*, 17 Cal. 415.

(b) *Brasher v. Davidson*, 31 Tex. 190 ; *Gregg v. Fitzhugh*, 36 Tex. 127. So where payment is to be made in goods at a stipulated price. *Ranger v. Hearne*, 37 Tex. 30.

(c) *Shepherd v. Hampton*, 3 Wheat. 200.

(d) *Galigher v. Jones*, 129 U. S. 193.

(e) *Stapleton v. King*, 40 Ia. 278.

vendor's breach of the contract, or any tender of the rest of the purchase-money, this was held in Vermont not such a payment in advance as to come within the rule.^(*) In England, actions for the non-delivery of railway shares pursuant to a contract of sale are distinguished from actions for not replacing borrowed stock, and in the former class of cases the market price on the day when the contract of sale is to be performed, instead of that on the day of trial, is fixed as the standard for the computation of the damages.^(b)

§ 746. The rule disapproved in other jurisdictions.—But, as has been seen, the rule of higher intermediate value has been disapproved in many jurisdictions; and in them the measure of damages is held to be the same, whether the consideration was or was not paid in advance.^(c) The rule in Vermont was thus stated by Redfield, C. J., in delivering the opinion of the court, in *Humphreysville Copper Co. v. Copper Mining Co.*:^(d) “The only general damages which the vendee of personal property is entitled to recover for failure to deliver the articles according to the contract, whether the price be paid or not, is the difference between the contract price and the market price of the article at the stipulated time and place of delivery, when the price has advanced, together with the money paid towards the price.” And in *Hill v. Smith*,^(e) the same learned court, after adverting to the conflict of authority on this question, said: “It has not been adjudged in this State, that payment in advance in

(*) *Worthen v. Wilmot*, 30 Vt. 555.

(b) *Tempest v. Kilner* 2 C. B. 300; 3 C. B. 249; *Shaw v. Holland*, 15 M. & W. 136; *Barned v. Hamilton*, 2 Railw. & Can. Cas. 624.

(c) *Cushman v. Hayes*, 46 Ill. 145; *McKenney v. Haines*, 63 Me. 74 (*semble*); *Coffman v. Williams*, 4 Heisk. 233, 240.

(d) 33 Vt. 92, 99.

(e) 32 Vt. 433.

such a case varies the rule of damages, and so far as any indication can be gathered from the cases, . . . it seems to be in the direction of not permitting that fact to affect the rule. Upon principle, as well as in view of practical consequences, we prefer the result at which Mr. Sedgwick has arrived, upon a most elaborate and able examination of the subject, that the market value or price on the day of the breach of the contract controls the measure of damages." This is so, also, as we shall presently see, in actions against the vendee. In *Rider v. Kelley*,^(*) a case of this kind in the same State, the court said: "It stands upon this reasonable ground, that as the title to the property remains in the seller, he can, upon non-acceptance by the vendee, sell the property at once for its market price, and therefore that the difference between such market price and the contract price will indemnify him against loss." ^(b) In *Rose v. Bozeman*,^(c) it was held that the measure of damages for the breach of a contract to deliver cotton at a specified time and place was its value at the time of the breach, and that the payment of the price in advance did not affect the rule. In Kentucky, where one Yoder covenanted to furnish Allen, by a given day, two slaves, in consideration of \$450 then paid, and \$210 to be paid on their delivery, it was said by the Court of Appeals, that for a failure to furnish the slaves according to contract, the obligors were liable for damages to Allen. "The measure of those damages was the value of the negroes described at the time and place of performance. This was the province of the jury to ascertain. It has done

(*) 32 Vt. 268, 273.

(b) *Acc. Cofield v. Clark*, 2 Col. 101; *Smith v. Dunlap*, 12 Ill. 184.

(c) 41 Ala. 678; S. C. 40 Ala. 212.

so, and the amount of consideration did not form a subject of material inquiry." (*)

In *Gray v. Portland Bank*,^(b) an action for refusal to accept a subscription for stock, Sedgwick, J., said: "The price of the stock at the time it should be transferred or delivered (and the same rule applies to other personal property) shall be that by which the damages shall be assessed. If the plaintiff intends to *retain* the stock, the then price is what he must pay for an equal amount, and if he intends it for *sale*, that price is what he would obtain for it." And so * it was held in Massachusetts,¹ that where the defendant had agreed to deliver a certificate of ten shares of the corporate stock of a certain manufacturing company, whose capital was to be one hundred thousand dollars, divided into not more than two hundred shares, and instead thereof made a tender of a certificate of ten shares of the stock of the company, of which thirty-four thousand dollars only were paid, divided into seventy shares; that the measure of damages was the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had then been ready in good faith to operate upon the capital, pursuant to their charter.^(c)**

§ 747. **Distinction between stock and merchandise.**—In some jurisdictions, though a higher intermediate value is allowed in the case of non-delivery of stock, it is not allowed in the case of other personal property, though the price has been paid in advance. So in Pennsylvania, though, as we have seen, the rule prevails in stock transactions, it is not approved with regard to chat-

¹ *Dyer v. Rich*, 1 Met. 180.

(*) *Yoder v. Allen*, 2 Bibb 338.

(b) 3 Mass. 364, 390.

(c) *Acc. Struthers v. Clark*, 30 Pa. 210.

tels generally. In an early case it appeared that * Woolston bought of Bosler 13,000 *morus multicaulis*, and paid the price; the trees were not delivered. Smethurst, the defendant, gave a guaranty for the performance by Bosler of his contract to deliver the trees on five days' notice. Smethurst being proved liable, it was insisted that the measure of damages was the value of *morus multicaulis* at the time of the breach of contract, or about that time. But the judge who tried the cause said that the sum paid by Woolston, the plaintiff, to Bosler, furnished the rule. On writ of error, the Supreme Court of Pennsylvania held the charge wrong. After noting the case of *Shepherd v. Hampton*, above cited, the court said, it is evident that C. J. Marshall "failed to advert to the difference between a suit on the contract itself, and a suit grounded on the rescission of the contract." In the latter case, the court said, the money paid could be recovered; but in the former, the value must be always the measure of damages.¹ **

¹ *Smethurst v. Woolston*, 5 W. & S. 106. The language of Rogers, J., is as follows: the distinctions are very acute:

"The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor, for a breach of the contract. This principle is ruled in *Meason v. Philips* (Addison, 346); is recognized in *Edgar v. Boies* (11 S. & R. 45), and is in effect affirmed by all the authorities cited. Indeed the general principle is not denied, but it is contended that this is an exception; that the rule holds good only when the purchase money has not been paid, but that when the purchase money has been advanced by the vendee, the measure of damages is the sum paid or the value of the article which forms the consideration of the contract. But, for this distinction no authority has been cited except a *dictum* (doubtless entitled to great respect) of Chief-Justice Marshall, in *Shepherd v. Hampton*, 3 Wheat. 200.

After affirming the general principle, he adds, 'For myself only, I can say that I should not think the rule would apply to a case where advances of money had been made by the purchaser under a contract; but I am not aware what would be the opinion of the court in such a case.' Taking the remarks of the Chief Justice in the broadest sense, and supposing them to be directly applicable to the case in hand (of which there is some room to doubt), it is very evident that he failed to advert to the difference between a suit on the contract itself and a suit grounded on the rescission of the contract. But this distinction, which pervades all the authorities, governs the whole case; for the purchaser may declare specially for the breach of the contract; or simply for money had and received, to recover back the deposit, if any be made, or the purchase money if it be paid; or he may join both causes of action in the same declaration. And when this is done, it is granted that under the money

In other jurisdictions it is said that there should be no distinction.^(a) So in New York, while the rule giving the vendee the advantage of the rise in value where the price is paid in advance is recognized,^(b) no distinction is made between the case of the sale of stocks and other

count, the money advanced may be recovered back, or where a specific article has been given in satisfaction, the purchaser may, when default is made, elect to consider the contract at an end, and recover the article itself, or its value from the vendor. But, on the other hand, where the purchaser declares specially for breach of the contract, and thereby affirms it, the only rule of damages is the value of the article, at or about the time it is to be delivered.

"Where the vendor fails to deliver the article bought, the purchaser may elect to rescind the contract and recover back the money paid, or he may bring suit on the agreement, and recover the value at or about the time it ought to have been delivered. And this is a just rule, for if it has risen in value he has the advantage of the increased price; if it has decreased, why should he, when he adheres to the contract, recover more from the vendor than for the injury he has sustained by the non-performance of the agreement? And the vendee has the less reason to complain, because he may, as before stated, rescind the bargain and place himself in the same situation as before it was made. It is said that the vendor is, in the case supposed, in default, and this is true; but where *there is any circumstance of aggravation, which is rarely the case, the jury may do justice by a liberal estimate of the value of the goods.* It has been suggested that the contract, on failure of the vendor to perform his part of it, is *ipso facto* rescinded; but this is a novel idea, for it can be rescinded only with the assent of the vendee, who may in a given case elect to consider the agreement at an end. And in the latter case, that is, where the purchaser agrees that the contract be re-

scinded, the remedy against the guarantor is gone; for it is only on the footing of subsistence of the contract between the vendor and vendee, which he guarantees, that he is liable. This is so plain as not to need the aid of argument. It is very true that a deposit, or even the interest on a deposit, may, in certain cases, be recovered on a special count against the vendor. But these cases form rather the exception than the rule. Usually the damages sustained are much less than the deposit; and besides, this is necessary, for otherwise it could not be recovered at all against the vendor, who has not received the money, the deposit being in the hands of the auctioneer, and he alone is liable for money had and received. Besides, the cases cited are on sales of lands by auctioneers, and the same rules cannot hold as on the sale of chattels; for lands, unlike stocks, etc., have no market value. There is nothing in the suggestion that the agreement takes the case out of the general rule. The suit is brought for breach of an agreement, the performance of which the defendant agreed to guarantee. It is, therefore, from necessity, a suit in affirmance of the contract. The defendant agrees, in effect, that if the vendor fails to perform the agreement he will pay the value of the trees at the time they ought to have been delivered."

When we come to the subject of warranties, we shall see that the right to rescind, here declared, is more than doubtful; nor can it be considered correct to leave a question of this kind to a jury with any instructions so vague or dangerous, as that they are at liberty to make "*a liberal estimate*" of the value of the property.

(a) Cartwright v. McCook, 33 Tex. 612; Gregg v. Fitzhugh, 36 Tex. 127; Enders v. Board of Public Works, 1 Gratt. 364.

(b) Arnold v. Suffolk Bank, 27 Barb. 424.

personal property where the price is not paid in advance, and in the former case as well as the latter, the plaintiff is restricted to the difference in market value on the day when the property should have been delivered.^(*)

§ 748. **No just distinction.**—* There appears no solid reason for making any difference between stock and any other vendible commodity. Where stock is loaned, or the price of the article paid for, in either case the party entitled to the delivery parts with his property on the faith of the contract, and in either case is prevented from using it, up to the time of trial. The question is, whether, in either case, the law should act on the assumption that the plaintiff would have retained the property if the contract had been complied with, till the period of the highest value, and have realized that price, and thus give damages which are purely conjectural. It will be noticed that in the case of *Clark v. Pinney*, it was intimated by the Supreme Court of New York, that the rule ought to be limited to the case of articles intended for sale; and that in *Startup v. Cortazzi*, it was suggested that the plaintiffs had given no proof of the purpose for which the article was intended; the niceness of the first distinction, the difficulty of furnishing satisfactory proof under the second head, and the general policy of the law which denies conjectural relief, seem strongly to point to the period of breach as the true time, in all cases, of estimating the damages, unless it be shown that the article was to be delivered for some specific object known to both parties at the time, and that thus a loss, within the contemplation of both parties, has been sustained. The fact of payment in advance throws no light on the injury sustained by the purchaser; nor does it at

(*) *Belden v. Nicolay*, 4 E. D. Smith 14.

all increase the probability that he would have retained the article till the rise of price. The value of the article at the time of breach, with interest for delay, and subject to the above exception, seems as near an approach to the actual loss sustained as can be effected, without embarking upon a vague search after facts impossible, in most cases, to be proved with any degree of satisfaction.

§ 749. **Same reason for rule where property has fallen.**—And if this rule be sound, it applies as well to cases where the property has fallen as to those where it has risen. The purchaser claims his advance; but if he gets the value of the article at the time of the breach, the contract is performed; and if this sum be less than his advance, his loss is ascribable purely to his own bargain. It may undoubtedly be urged, and with force, that the contract being violated by the defendant, the retention of any part of the plaintiff's money is against conscience. It has already, however, been said that in actions of contract the only object of the tribunal must be to carry into effect the agreement of the parties as far as possible, and that the motives of the defaulter are not to be taken into view. If this be correct, then certainly it removes the last objection to the adoption of the general rule, that the value at the time of the breach, with interest for the delay, is, with the exception of the defendant's liability to make remuneration for loss resulting from facts within the knowledge and in the contemplation of both parties at the time of the contract, to furnish the measure of damages.**

BREACH BY VENDEE.

§ 750. **Rule where title has passed.**—In these cases the contract fixes the price or it does not. If this point be left doubtful, the value of the article in the market is the

rule.^(*) * If the vendee resell the article, he can be made liable for the price received, deducting usual charges and commissions. He is treated as a trustee or agent of the plaintiff, selling on his account and for his benefit; and it is both equitable and legal that, having received the money, he should pay it over to the owner, after retaining a due compensation for his services.¹ But this is a very unusual case, and the contract generally fixes the price.

Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement;^(b) but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases that the vendor can resell them if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale.² Though perhaps more prudent, it is not necessary that the sale should be at auction. It is only requisite to show that the property was sold for a fair price.^(c) ** But if the vendor does not pursue this course, and without reselling the goods sues the vendee for his breach of contract, the question arises, which we have already

¹ *Greene v. Bateman*, 2 Woodb. & M. 359; *ter*, 5 Vin. Abr. 538; s. c. *Cud v. Rutter*, 1 P. Wms. 570; *Sands v. Taylor*, 5 Johns. 395.

² *Langford v. Tyler's Adm'r*, 1 Salk. 113; s. c. 6 Mod. 162; *Cuddee v. Rutter*, 5 White v. Kearney, 2 La. Ann. 639.

(*) *Henckley v. Hendrickson*, 5 McLean 170; *Taft v. Travis*, 136 Mass. 95; *Deutsch v. Pratt*, 149 Mass. 415; *Deck v. Feld*, 38 Mo. App. 674; *Althouse v. Alvord*, 28 Wis. 577.

(b) *Suber v. Pullin*, 1 S. C. 273; *Phillips v. Merritt*, 2 Up. Can. C. P. 513.

(c) *Crooks v. Moore*, 1 Sandf. 297.

stated, whether the vendor can recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be, that where the title to the goods has passed to the vendee, the vendor can recover the contract price in full. (*)

§ 751. *Instances.*—* In a suit brought by vendor against vendee, the plaintiff had contracted to sell the defendant three hundred tons of Campeachy logwood; "such as may be determined to be otherwise by impartial judges to be rejected"; the defendant refused to accept the wood offered, because it was not all Campeachy logwood; it was insisted on his behalf that he was not bound by the contract price, as a part only of the stipulated quantity had been furnished; and that the measure of damages was the difference between the contract price and what the article would have sold for at the time when the true quantity of Campeachy logwood was ascertained. But the Court of King's Bench held that the defendant was bound to take the part which was Campeachy, and that, he having repudiated the whole contract, the measure of the damages was the contract price on that quantity, *i. e.*, the Campeachy wood.¹

The question has been considered in New York, and decided in the same way.* The plaintiff, a carriage-maker, was employed to build a sulky for the defendant. A due tender having been made of the carriage, and it being deposited with a third person, the defendant having refused payment, and suit brought, it was insisted that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the

¹ *Graham v. Jackson*, 14 East 498.

² *Bement v. Smith*, 15 Wend. 493, 496.

(*) *Pearson v. Mason*, 120 Mass. 53; *Crawford v. Earl*, 38 Wis. 312.

defendant, delay, loss of sale, etc.; but the court held otherwise, using this language :

“Upon principle, I may ask what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it; is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale.

“Where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part; the defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction; and if it sold for less than \$80 the defendant must have paid the balance. The reason given for this rule by Kent, C. J.,¹ is, that it would be unreasonable to oblige him to let the article perish on his hands and run the risk of the insolvency of the buyer. But if, after tender or notice, whichever may be necessary, the vendor chooses to run that risk, and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.” **

It has been held in Pennsylvania, where goods are sold at auction on credit, and the vendee refuses to take them, the owner may, before the expiration of the credit, sue the vendee for his breach of contract; and in such case, the measure of damages is the difference between the price agreed to be paid for the goods and their value at

¹ *Sands v. Taylor*, 5 Johns. 395, 411.

the time that the vendee refused to take them. This is clearly so, because no action can be brought *for the price* of the goods until the time of credit is expired. But in this case, Gibson, J., proceeded to say: "Properly speaking, the seller cannot *recover the price where he has retained the goods* in consequence of the buyer's refusing to comply with any part of the contract."¹ * So in Massachusetts, where a contract had been made for the purchase of railway shares, and a part of the price paid, and the vendor caused them to be transferred on the books of the company, but the defendant refused to accept them after such transfer, it was held that the measure of damages was the contract price.² **

§ 752. **Manufactured articles—Minerals and gravel.**—A contract for the manufacture of a certain article is in some jurisdictions regarded as a contract for work and labor; in others, as a contract of sale. In the former case the title to the finished article is in the party who orders the article; in the latter case it may be in one party or the other, according to circumstances. In either case, however, if the title is regarded by the court as being in the defendant, the manufacturer should be allowed the full contract price.^(a) If the title is still in the manufacturer, the plaintiff can recover the difference between the contract price and the cost of manufacture,^(b) since that, and not the market price, if any there is, would be the cost to the plaintiff, and would be the proper amount to deduct from the contract price in order to arrive at his net loss.

¹ Girard v. Taggart, 5 S. & R. 19, 34. ² Thompson v. Alger, 12 Met. 428.

(a) Bookwalter v. Clark, 11 Biss. 126; Gordon v. Norris, 49 N. H. 376; Shawhan v. Van Nest, 25 Oh. St. 490; Ballentine v. Robinson, 46 Pa. 177.

(b) Knowlton v. Oliver, 28 Fed. Rep. 516; Geiss v. Hardware Co., 37 Kas. 130; Rayburn v. Comstock, 80 Mich. 448; Black River L. Co. v. Warner, 93 Mo. 374; Muskegon C. R. Co. v. Keystone Mfg. Co., 135 Pa. 132.

The same rule has been followed in an action for breach of contract to purchase gravel of the plaintiff,^(*) and for breach of contract to purchase coal from the owner of the mine.^(b)

§ 753. **Rule where title has not passed.**—Where the title has not passed, the measure of damages is the difference between the contract and the market price of the article at the time when and the place where it should have been accepted.^(c) “The vendor of personal property in a suit against the vendee for not taking and paying for the property,” said Earl, C., in *Dustan v. McAndrew*,^(d) “has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the prop-

(*) *Hare v. Parkersburg*, 24 W. Va. 554.

(b) *Scott v. Kittanning Coal Co.*, 89 Pa. 231.

(c) *Hickman v. Haynes*, L. R. 10 C. P. 598; *Knowlton v. Oliver*, 28 Fed. Rep. 516; *Haskell v. McHenry*, 4 Cal. 411; *Groover v. Warfield*, 50 Ga. 644; *Camp v. Hamlin*, 55 Ga. 259; *Georgia R. Co. v. Augusta O. Co.*, 74 Ga. 497; *McNaught v. Dodson*, 49 Ill. 446; *Ullmann v. Kent*, 60 Ill. 271; *Burnham v. Roberts*, 70 Ill. 19; *Sanborn v. Benedict*, 78 Ill. 309; *Kadish v. Young*, 108 Ill. 170; *Thurman v. Wilson*, 7 Ill. App. 312; *Pittsburgh, C. & St. L. Ry. Co. v. Heck*, 50 Ind. 303; *Dwiggins v. Clark*, 94 Ind. 49; *McComas v. Haas*, 107 Ind. 512; *Harris Manuf. Co. v. Marsh*, 49 Ia. 11; *Williams v. Jones*, 1 Bush 621; *Collins v. Delaporte*, 115 Mass. 159; *Whitney v. Thacher*, 117 Mass. 523; *Brownlee v. Bolton*, 44 Mich. 218; *Whitmore v. Coats*, 14 Mo. 9; *Northrup v. Cook*, 39 Mo. 208 (*semble*); *Black River L. Co. v. Warner*, 93 Mo. 374; *Dodge v. Kiene*, 44 N. W. Rep. 191 (Neb.); *Stevens v. Lyford*, 7 N. H. 360; *Gordon v. Norris*, 49 N. H. 376; *Haines v. Tucker*, 50 N. H. 307; *Pollen v. Le Roy*, 30 N. Y. 549; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426; *Bridgford v. Crocker*, 60 N. Y. 627; *Cahen v. Platt*, 69 N. Y. 348; *Canda v. Wick*, 100 N. Y. 127; *Billings v. Vanderbeck*, 23 Barb. 546; *Mallory v. Lord*, 29 Barb. 454; *Hewitt v. Miller*, 61 Barb. 567; *Clements v. State*, 77 N. C. 142; *Nixon v. Nixon*, 21 Oh. St. 114; *Cullen v. Bimm*, 37 Oh. St. 236; *Weltner v. Riggs*, 3 W. Va. 445; *Hall v. Pierce*, 4 W. Va. 107; *James v. Adams*, 8 W. Va. 568; s. c. 16 W. Va. 245; *Ganson v. Madigan*, 13 Wis. 67; *Chapman v. Ingram*, 30 Wis. 290; *Chapman v. Larin*, 4 Can. 349; *Boswell v. Kilborn*, 6 Low. Can. Jur. 108; *Moore v. Logan*, 5 Up. Can. C. P. 294.

(d) 44 N. Y. 72, 78; *acc. Dwiggins v. Clark*, 94 Ind. 49.

erty for the vendee, and sue him for the entire purchase price; (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." Where a purchaser extends the time for the delivery of goods, the vendor, suing for a failure to accept, recovers the difference between the contract price and the value at a reasonable time after a final demand for the vendee to take them.^(a) The market price at the place to which the defendant intended to ship the goods cannot be taken.^(b)

Where the contract price and the market price are the same, only nominal damages can be recovered; ^(c) and the same is true where the sale is at such price as should be mutually agreed upon.^(d) So where the plaintiff has not the goods that he agrees to sell, but makes a side-contract with another party to furnish them, he will only be allowed to recover the difference between the original contract price and the market price at the time of the offer, with interest.¹ If the property is worthless in the hands of the plaintiff, the whole price agreed should be recovered.^(e) Where a quantity of straw was sold, a portion of which only was taken away, and the buyer subsequently refused to take the remainder, the vendor threw it, the next spring, it having become damaged, into

¹ *Stanton v. Small*, 3 Sandf. 230. So, is said a portion of the property was too, in *Ohio, M'Naughten v. Cassally*, ready to be delivered.
⁴ *M'Lean* 530; though in this case it

(a) *Hickman v. Haynes*, L. R. 10 C. P. 598; *Smith v. Snyder*, 77 Va. 432.

(b) *Cahen v. Platt*, 69 N. Y. 348.

(c) *Ellithorpe A. B. Co. v. Sire*, 41 Fed. Rep. 662; *Foss v. Sabin*, 84 Ill. 564; *Wire v. Foster*, 62 Ia. 114.

(d) *Smith v. Loag*, 132 Pa. 301.

(e) *Allen v. Jarvis*, 20 Conn. 38.

the barn-yard to his cattle. *Held*, that the measure of damages against the vendee for refusing to complete his contract was the contract price, less its value to the vendor for the use to which it was applied.^(a) When there is no market at the place of delivery the price of getting the goods to the nearest market is to be subtracted from the price at that market in order to find the value at the place of delivery.^(b)

§ 754. *Rescission*.—The question of the rescission of a contract must not be confounded with the question of breach. It is settled that a breach may arise by refusal of one of the parties to go on with performance.^(c) This, however, is not rescission. Parties can only rescind a contract by annulling it, or withdrawing themselves from it altogether, in which case it is as if it had never been made. In such an event, it would seem that properly speaking damages for a breach should not be allowed; the plaintiff should recover, not on the basis of the contract, but as if no contract had been made. And so where plaintiff and defendant contracted for the sale of 50,000 bricks, and the plaintiff delivered 20,000, when the defendant wrongfully refused to receive any more and the plaintiff treated the contract as rescinded, it was held that plaintiff was entitled to recover the full market value of those delivered.^(d) But where the defendant refused to fulfil his agreement to take back stock he had sold the plaintiff, this was regarded by the court as a rescission of the contract of sale, only so far as to re-vest the title to the stock in the defendant; and the plaintiff was allowed to recover the full price agreed upon.^(e)

(a) *Chamberlain v. Farr*, 23 Vt. 265.

(b) *Barry v. Cavanagh*, 127 Mass. 394.

(c) *Hochster v. De La Tour*, 2 E. & B. 678.

(d) *Terwilliger v. Knapp*, 2 E. D. Smith 86.

(e) *Laubach v. Laubach*, 73 Pa. 387; *acc. Thorndike v. Locke*, 98 Mass. 340.

§ 755. **Resale after default.**—It is often said that where the vendor resells the property, the difference between the price obtained at the resale and the contract price is absolutely the measure of damages;^(a) or, more exactly, the difference between the net proceeds of the resale (the price obtained less the expense) and the contract price.^(b) But in other cases it is more properly held that the price obtained at the resale is only evidence of the market value.^(c) It is sometimes held that the price obtained on resale will be binding on the defendant if he had notice of the resale.^(d) Where the sale is made by one acting in an official capacity, as an administrator, the difference between the prices of the two sales is, it would seem, the absolute measure of damages.^(e) A resale will not furnish the measure of damages, if it does not take place within a reasonable time after the failure to accept. In *Smith v. Pettee*,^(f) it was held that four months was not a reasonable time.

The question must be determined by all the circumstances. In a case of the sort under discussion, where, after notice, the seller resold the goods at auction, the Court of Appeals of New York said:^(g) "The price

(a) *Pope v. Filley*, 3 McCr. 190; *Saladin v. Mitchell*, 45 Ill. 79; *McLean v. Richardson*, 127 Mass. 339; *Black River L. Co. v. Warner*, 93 Mo. 374; *Townshend v. Simon*, 38 N. J. L. 239; *Tompkins v. Haas*, 2 Pa. St. 74; *Tindle's Appeal*, 77 Pa. 201; *James v. Adams*, 8 W. Va. 568; *Pickering v. Bardwell*, 21 Wis. 562; *Brunskill v. Mair*, 15 Up. Can. Q. B. 213.

(b) *Whitney v. Boardman*, 118 Mass. 242; *Whitmore v. Coats*, 14 Mo. 9; *Sawyer v. Dean*, 114 N. Y. 469.

(c) *Camp v. Hamlin*, 55 Ga. 259; *Atkins v. Cobb*, 56 Ga. 86; *Ullmann v. Kent*, 60 Ill. 271; *Croak v. Owens*, 121 Mass. 28; *Freyman v. Knecht*, 78 Pa. 141.

(d) *Bagley v. Findlay*, 82 Ill. 524; *Rickey v. Tenbroeck*, 63 Mo. 563; *Pollen v. Le Roy*, 30 N. Y. 549.

(e) *Alexander v. Herring*, 54 Ga. 200; *Gaskell v. Morris*, 7 W. & S. 33.

(f) 7 Hun 334.

(g) *Bigelow v. Legg*, 102 N. Y. 652.

obtained after such default, upon a resale, within a reasonable time, although at auction, is evidence of the market value of an article and to be allowed such weight as the circumstances of the sale entitle it to." And, on the other hand, a resale at private sale, without reasonable notice or efforts to secure the best price possible, and no evidence being offered that the price obtained was a fair one, does not fix the legal measure of damages.^(*)

§ 756. *Promise to give a bill or note.*—* Where goods are sold to be paid for by note or bill payable at a future day, and the note or bill is not given, it is well settled in England and in this country, that the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired ; but he can sue immediately for a breach of the special agreement.¹ And in New York it has been held, that in such action he will be entitled to recover as damages the whole value of the goods, with the suggestion that there should be a rebate of interest during the stipulated period of credit ;² the court, Bronson, J., saying : " The right of action is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired. The only difference between suing at one time or the other relates to the *form of the remedy*. In the one case, the plaintiff must declare specially, in the other he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract, and the

¹ *Mussen v. Price*, 4 East 147 ; *Dutton v. Solomonson*, 3 Bos. & Pull. 582 ; *Hoskins v. Duperoy*, 9 East 498 ; *Hutchinson v. Reid*, 3 Camp. 329 ; *Loring v. Gurney*, 5 Pick. 15 ; *Hunne-man v. Inhabitants of Grafton*, 10 Met. 454.

² *Hanna v. Mills*, 21 Wend. 90. In the English cases nothing is said as to the amount which the plaintiff is entitled to recover. In the case of *Hutchinson v. Reid*, the plaintiff, though without discussion, was permitted to take a verdict for the price of the goods.

(*) *Case v. Simonds*, 7 N. Y. Suppl. 253.

contract is no more broken after the credit expires than it was the moment that the note or bill was wrongfully withheld."

So in a case in Pennsylvania,¹ it was charged at the trial, that where goods are sold on credit, the vendee to give his note, which he refuses to do after the goods are delivered, suit may be brought for a breach of the contract before the expiration of the credit, in which case the measure of damages is the price of the goods.^(*) But the direction was held right.^{1**}

This rule does not apply, of course, where the note to be given in payment for goods is that of a third party. So where the defendant agreed to pay for goods by the transfer of the note of a third party, secured by a second mortgage on certain property, and the third party was insolvent and the security worthless, only nominal damages were allowed upon breach.^(b) This is on the same principle which restricts recovery for the value of a note to its actual value.^(c)

¹ *Rinehart v. Olwine*, 5 Watts & Serg. 157.

^{*} In a somewhat similar case, the same rule was laid down in Connecticut; the defendant promised the plaintiff to give a note immediately for one hundred dollars, payable in sixty days. On refusal to give the note, and before the expiration of the sixty days, suit was brought; and it was insisted that the plaintiff could only recover nominal damages. But the court held the plaintiff entitled to recover the full amount of the note, saying: "The plaintiff can have no other action than upon this special contract; and it is very obvious that in some form of action and at some time, he is entitled to recover the actual damage sustained, one hundred

dollars, which the defendant promised to pay. The special promise of the defendant to give his note was as effectually broken when this action was commenced, as it was after the expiration of sixty days; and if the plaintiff recovers nominal damages now, we do not see but he will be debarred from a recovery of his actual damages hereafter; because, if he sues again, he can only sue for the same breach of promise, in the same form of action, and in the same manner of declaring as he is now doing. The second action would be for the same cause of action as the first, and must so appear to be from the record itself." *Stoddard v. Mix*, 14 Conn. 12, 24.

(*) *Acc. Carnahan v. Hughes*, 108 Ind. 225; *Stephenson v. Repp*, 25 N. E. Rep. 803 (Oh.).

(b) *Derleth v. Degraaf*, 51 N. Y. Super. Ct. 369.

(c) *Thompson v. Halbert*, 40 Hun 536; see § 256.

§ 757. **Consequential damages.**— In *McCracken v. Webb* (*) the plaintiff was allowed to recover the difference between the contract and market price of some hogs he had sold the defendant, *plus* the expense of keeping them from the time of defendant's refusal to accept to the date of resale.

COUNTERMAND BEFORE TIME FOR PERFORMANCE.

§ 758. **Effect of notice of countermand.**— *An effort has been made in many cases by the purchaser to relieve himself from the contract of sale before the time fixed for performance, by giving notice that he would not be ready to complete the agreement; and in these cases it has been insisted that the damages should be estimated as at the time of giving notice; but the English courts, justly denying the right of either party to rescind the agreement, have adhered to the day of the breach as the period for estimating the damages.**

It was held in *Hochster v. De la Tour* (b) that if upon a contract for the future delivery of goods the purchaser, before the time for delivery, gives notice that he will not accept the goods, this may be treated by the seller as a breach of contract. The seller is not, however, obliged to treat it as such. He may wait until the time for delivery, and then, upon a tender of the goods and a refusal to accept them, bring suit. When in such a case the value of the goods has fallen between the notice and the time for delivery, the purchaser has in some cases claimed that damages should have been assessed as of the time of the notice, because the plaintiff should then have sold the goods in the market. A sufficient answer to this contention, however, is that the plaintiff had a right to

(*) 36 Ia. 551.

(b) 2 E. & B. 678.

regard the contract as still in force until the time fixed for performance, and on a familiar principle, that the plaintiff is not required to anticipate wrong, he could not be called upon to take any steps to avoid loss before breach by the defendant.^(a)

The point was elaborately discussed by the Supreme Court of Illinois in the case of *Kadish v. Young*.^(b) In that case appellees sold barley to appellants, to be delivered in January. The purchasers gave notice in December that they did not consider themselves bound by the contract, and would not comply with its terms. The sellers tendered the barley in January. It was held that the measure of damages was the difference between the contract price and the market price at the time of tender. Scholfield, J., said : ^(c)

“Nothing would seem to be plainer than that while the contract is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale ; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.”

The appellants cited the dictum of Keating, J., in the

^(a) § 224.

^(b) 108 Ill. 170.

^(c) P. 183.

analogous case of *Roper v. Johnson*,^(*) "If there had been any fall in the market, or any other circumstance calculated to diminish the loss, it would be for the defendant to show it"; and the words of Cockburn, C. J., in *Frost v. Knight*,^(b) to the effect that the damages are subject to abatement in respect of any circumstances which would entitle him to a reduction. On this point the court said :^(c)

"It is enough to observe in answer to this, that in both *Frost v. Knight* and *Roper v. Johnson* the notice that defendant would not comply with the contract was accepted and acted upon by the plaintiff as a breach of the contract; and so what was said in respect of the duty of the plaintiff to mitigate damages was said with reference to a case wherein he recognized the contract as having been broken by the notice of the adverse party, and with reference to what was to be done by him upon and after the recognition of that breach, and hence can have no application here. If a party is not compelled to accept the declarations of the other party to a contract that he will not perform it, as a breach, it must logically follow that he is under no obligation to regard that declaration for any purpose, for the theory in such case, as laid down by Cockburn, C. J., in *Frost v. Knight*, is : 'He keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.'"

* In an action of assumpsit¹ by plaintiff against defendant for not accepting a quantity of wheat which the plaintiff, early in January, 1839, contracted to sell to the defendant, to be delivered at Birmingham, as soon as vessels could be

¹ *Phillipotts v. Evans*, 5 M. & W. 475.

(*) L. R. 8 C. P. 167, 178.

(b) L. R. 7 Ex. 111, 113.

(c) P. 182.

obtained for the carriage thereof, the defendant gave notice, on the 26th of January, that he would not accept the wheat if delivered—wheat having then fallen in price. It was at that time on its way to Birmingham, and on its arrival was offered to the defendant; but he refused to take it. On the trial, it was contended that the measure of damages was the difference between the contract price and the price on the 26th of January, when notice was given. But on argument, the Exchequer held that the true rule was the difference between the contract price and that on the day when it was offered at Birmingham; and they relied on the case of *Leigh v. Patterson*.¹

So in another case,² which was an action of assumpsit for not accepting certain railway shares, the contract of sale was made on the 26th of August, 1840; on the 7th of September, the defendant refused to take them. On the 15th, the plaintiff resold the shares at a loss of £161 from the price agreed on; and the jury, under the charge of the judge, found a verdict for this amount. The defendant, on a motion for a new trial, insisted that the damages should have been calculated only to the 7th of September, when the defendant declared off. But Alderson, B., said: "The damages are to be calculated at the difference between the contract price and the price to be obtained within a reasonable time after the breach of contract; and it was for the jury to say what was such reasonable time."

So where a person had contracted for a certain quantity of oil, it was held, that in an action for not accepting and paying for the oil, the proper measure of damages was the difference between the price he had contracted to pay for the oil, and the market price at the time when the contract

¹ 8 Taunt. 540.

Stewart v. Cauty, 8 M. & W. 160.

was broken.^{1**} And where, by the terms of the contract, the goods were to be delivered at stated periods, but were not all delivered at the respective times, the purchaser not countermanding them, but requesting from time to time that the supply might be delayed, and finally refusing to accept any more; it was held, that damages might be given for the whole quantity remaining on hand, though consisting in part of quantities which, without being actually countermanded, had, by desire of the purchasers, been kept back at the times appointed for delivery; and that it was a proper direction to the jury to give such damages as would leave the plaintiffs in the same situation as if the defendants had fulfilled their contract.^(*) Where, however, the contract calls for the manufacture and delivery of goods, the plaintiff, after notice that the defendant will not fulfil his contract, cannot go on manufacturing and upon tender recover the whole contract price.^(b)

The same question may arise where the countermand is by the vendor. Thus in England,^{1*} in an action to recover damages for the breach of a contract, by which the defendant had engaged to furnish the plaintiff a certain quantity of tallow in *all December*, at 65s. per cwt., the defendant had apprised the plaintiff, on the 1st of October, that he could not execute the contract, and he insisted that the difference between the contract price (65s.) and that of the first of October (71s.) was the rule of damages, on the ground that the plaintiff could, as soon as apprised that the contract would not be executed, have gone into the market and supplied himself at the then rates. The plaintiff, however, insisted that he was entitled

¹ *Boorman v. Nash*, 9 B. & C. 145. ^{*} *Leigh v. Paterson*, 8 Taunt. 540.

(*) *Cort v. Ambergate, N. & B. & E. J. Ry. Co.*, 17 Q. B. 127.

(b) *Tufts v. Lawrence*, 77 Tex. 526; the general rule was laid down in *Clark v. Marsiglia*, 1 Den. 317.

to the difference between the contract price (65s.) and the price on the 31st December (81s.), that being the last day for the performance of the contract ; and of that opinion was the court. Park, J., said : " For anything that appears, the plaintiff never assented to rescind the contract, and the defendant might have delivered the tallow at any moment up to the 31st of December ; and the price on that day should have regulated the verdict of the jury." **

The result of these cases seems to be that a countermand by either party does not change the time at which damages are to be estimated, nor affect the general rule of damages. If the countermand is treated as a breach, the person so treating it acts thereafter under the rule of avoidable consequences ; but if it is not treated as a breach, the rule of avoidable consequences can have no application before the time fixed for performance.

WARRANTY.

§ 759. Warranties.—* We come next to the subject of warranties. The contract of sale may be complied with on the part of the vendor, so far that delivery may have been made, but the article may still not satisfy the warranties, either express or implied, that have been made at the time of sale ; and in this case the rule of damages is now to be investigated. We, for the present, assume that no fraud enters into the transaction, inasmuch as, in that case, we shall presently see different rules apply ; and, moreover, it transfers the subject of compensation in a great degree to the discretion of the jury. It will be noticed that, in one branch of the question which we now proceed to examine, the rights and liabilities of the parties concerned are often identical with those of principal and surety ; but reserving for

separate inquiry that subject in its more extended form, we shall confine ourselves at present to the examination of warranties as contained in sales.

In cases of executory contracts, or contracts to deliver a specific article, if on delivery they prove not to satisfy the agreement, the plaintiff, as we have seen, is not bound to retain the articles, but he may return them within a reasonable time. So it was originally held in regard to chattels sold with warranty, that if they did not answer the agreement, the plaintiff had his election of two remedies: he might either return the article and recover the price paid; or he might sell the article and recover damages in an action on the warranty.^(*)

The better opinion, however, seems now to be, that where there is no fraud and no agreement to return, the vendee cannot, at his own option, rescind the contract, but has only an action on the warranty.¹ So in New York, it has been said in a case of simple warranty, there being no provision in the contract for the return of the articles, that the title to the property becomes vested in the vendee as soon as delivered, and he can only recover for the difference in value between it as it is in fact and as it ought to have been.^(b)

This fluctuation of judicial opinion has produced a corresponding variety of decisions as to the measure of relief. It seems originally to have been held that the measure of damages in these cases was the difference between the price paid and the actual value; but it is now well settled that the rule is the difference between the actual value and the value that the article would have

¹ *Freeman v. Clute*, 3 Barb. 424.

(*) So held in the Special Court of Appeals of Virginia. *Graham v. Bardin*, 1 Patt. & H. 206.

(b) *Prentice v. Dike*, 6 Duer 220; *Pritchard v. Fox*, 4 Jones L. 140.

possessed if it had conformed to the warranty, the price paid being mere evidence of that value.**

§ 760. Cases allowing difference between price and actual value.—* In an early case,¹ Mr. J. Buller, discussing the question whether an action for money had and received would lie on an executed contract, said: "In a late case before me, on a warranty of a pair of horses to Dr. Compton, that they were five years old when in fact they turned out to be only four, I held that, *as the plaintiff had not rescinded the contract*, he could only recover damages; and then the question was, what was the difference *of the value* of horses of four or five years old."

In a subsequent case,² it was insisted that the plaintiff should have returned the animal which had been warranted sound. But it was held by all the judges that neither such return nor notice of the unsoundness was necessary to enable the plaintiff to maintain his action for the damages sustained. In another case,³ an action being brought on the warranty of a horse sold by the defendant to the plaintiff for £20, the warranty and the unsoundness being proved, the jury was directed that if the horse was kept, the verdict *ought to be for the difference between the value and the price paid*. The jury, however, contrary to this direction, found for the plaintiff £30 10s.; £20 for the horse, and 10 guineas for its keep. The defendant moved for a new trial; and the verdict was reduced to £20, the plaintiff undertaking to deliver back the horse, *free of any expense for its keep*.**

In a few jurisdictions this rule, making the difference between the price paid and the value of the thing with the defect, has been adopted.(*) But where the consid-

¹ *Towers v. Barrett*, 1 T. R. 133.

² *Caswell v. Coare*, 1 Taunt. 566.

³ *Filder v. Starkin*, 1 H. Bl. 17.

(*) *Morgan v. Ryerson*, 20 Ill. 343; *Crabtree v. Kile*, 21 Ill. 180; *Wallace*

eration is not a fixed price, as where one horse is exchanged for another, the rule, even in these jurisdictions, is the difference between the sound and unsound value.^(a) These cases proceed upon the ground that when the price paid is more or less than the sound value, the party having the best of the bargain ought not to be deprived of the benefit of it. If the purchaser agreed to pay an extravagant price, there is no reason, it is said, in the absence of fraud in the seller, why he should not be held to it; nor if a low one, why he should lose the advantage of his shrewd bargain. In the case of *Woodworth v. Woodburn*,^(b) the rule making the value as warranted instead of the price agreed, the standard by the departure from which the damages are measured, is assumed to be right, though the decision is placed on another ground.

§ 761. **Between value as warranted and actual value.**—The rule laid down in the preceding cases is not the law in most jurisdictions. In another English case,¹ in an action of assumpsit on a warranty of soundness in a horse, Lord Eldon spoke of the difference between the value of the article warranted and its actual value when sold, as the measure of damages; but the case did not turn on this point. Later, however, the precise subject was considered, and this rule finally adopted in another *action brought for the breach of a warranty.* The plaintiff had bought a horse of the defendant for £45, warranted sound. The plaintiff

¹ *Curtis v. Hannay*, 3 Esp. 82.

² *Clare v. Maynard*, 7 C. & P. 741.

v. Wren, 32 Ill. 146; *Callendar I. & W. Co. v. Badger*, 30 Ill. App. 314; *Courtney v. Boswell*, 65 Mo. 196; *Bump v. Cooper*, 23 Pac. Rep. 806 (Ore.); *Mooers v. Gooderham*, 14 Ont. 451.

^(a) *Wallace v. Wren*, 32 Ill. 146.

^(b) 20 Ill. 184. This case, it may be observed, was decided at the same term of the court (April, 1858) with that of *Morgan v. Ryerson*, above cited.

had sold the horse with warranty to one Collins for £55; Collins returned the horse as unsound; and the plaintiff was obliged to repay the £55, and the animal was sold for £17 15s. The plaintiff claimed the difference between that sum and £45, the price paid; the expense of bringing the horse to London; his keep from the time of purchase to the sale as unsound; the £10 paid to Collins; £1 15s. for an examination at the veterinary college; and £1 15s. for opinion of counsel. Lord Denman, C. J., at the trial of the cause, said: "As the warranty and the unsoundness are admitted on the record, the only question is the amount of the damages. I am of opinion that the amount of damages is what the horse would *be worth if sound*, deducting the price it sold for after the discovery of the unsoundness; and I think the price at which it was sold to the plaintiff *is not conclusive as to its value*, though I think it very strong evidence. The fair value of the horse, if sound, is the measure of the damages; and the sum the plaintiff gave is only the evidence of the value." He refused to allow the £10 paid Collins, because there was no evidence that the horse was worth more than the plaintiff gave for it. The expense of bringing the horse to London, and of keeping him there also, was allowed. The court was moved for a new trial as to the £10 paid Collins; but they refused to disturb the verdict, saying that this claim in substance amounted to a claim of compensation for the loss of a good bargain, which could not be allowed as damages in such an action.¹ (*) **

¹ From the report of this case in the King's Bench, 6 A. & E. 519, it appears that a question arose as to the sufficiency of the declaration. The plaintiff insisted that the £10 should be allowed as expenses, if not as profit. But to cover this, the court said there was no adequate allegation. See also Cox v. Walker, in notes to this case.

(*) *Acc. Burton v. Young*, 5 Harr. 233; *Muller v. Eno*, 14 N. Y. 597.

* In a case in New York,¹ assumpsit was brought on a warranty that 120 barrels of flour were superfine flour, of good quality. The price paid was \$9.50 per barrel; 60 barrels were defective. The defendant's counsel insisted that the measure of damages was the difference in value between the 60 barrels when sold and the value of superfine flour; but Willard, C. J., held at the trial that the plaintiffs were entitled to recover back the balance of the whole purchase-money paid for the 60 barrels, with interest, crediting the amount realized by them from their sale at auction. On a motion for a new trial, Cowen, J., said: "Regarding this case as one of simple warranty without fraud, the measure of damages adopted at the trial was wrong. It should have been the difference between the *value of the sixty barrels* at the time of the sale considered as good superfine flour, and *the value of the inferior article sold*. The purchaser is entitled to have the article made equal in quality to what the warranty assured it to be." A new trial was granted.

The question has been still more distinctly decided by the same court in another case.² (*) Gruman sued Cary on a warranty of soundness in a horse; the price paid was \$90, and the breach was a disease of the eyes. The defendant insisted that the proper measure of damages was the difference between the real value of the horse, if sound, and his value with the defect complained of. The court below, however, decided that the measure of damages was the difference between the price paid and the value with the defect. A verdict being found in conformity to this charge, on exception and writ of error, it was said by the Supreme Court:

¹ Voorhees v. Earl, 2 Hill 288, 291.

² Cary v. Gruman, 4 Hill 625, *per* Cowen, J.

(*) Acc. Comstock v. Hutchinson, 10 Barb. 211.

"The court below erred in laying down the rule of damages. The warranty cannot be satisfied, except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have *been worth* if the defect had not existed. . . . The rule, undoubtedly, is, that the agreed price is strong evidence of the actual value; and this should never be departed from unless it be clear that such value was more or less than the sum at which the parties fixed it. . . . It is impossible to say, nor have we the right to inquire, whether the real value of the horse in question, supposing him to have been sound, would have turned out to be more or less than the \$90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than \$80, the plaintiff then recovered ten dollars, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth \$100, the defendant would have been relieved from the payment of the ten dollars, because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty."

And a new trial was granted.** *Mr. Chancellor Kent¹ seems to prefer the rule as laid down in *Curtis v. Hannay*, cited above, on the ground of its being in harmony with the measure of damages on the covenant of warranty in the sale of land. But it is proper to notice that the doctrine settled is in analogy to the principle in another class of cases. It has been laid down as a general rule,² in regard to actions for non-performance of contracts (other than conveyances of lands), that the party ready to perform may recover damages to the extent of his injury, and that the price agreed to be paid on actual performance is not the measure of damages. This also seems the rule in Pennsylvania, where in the case of sale by sample, in an action on the implied representation or

¹ 2 Com, 480, in notes.

² *Shannon v. Comstock*, 21 Wend. 457.

warranty, the measure is held to be the difference between the value of the articles delivered and the commodity sold.¹ (*) **

§ 762. The latter the general rule.—* From these cases the result is, that in an action brought on a warranty, the true measure of damages is the difference between the value which the thing sold would have had at the time of the sale, if it had been sound or corresponding to the warranty, and its actual value with the defect.** And such is now the almost universally recognized rule.^(b) The rule is the same whether the suit is brought

¹ *Borrekins v. Bevan*, 3 Rawle 23.

(*) *Murry v. Meredith*, 25 Ark. 164; *Roberts v. Carter*, 28 Barb. 462.

(b) *Marshall v. Wood*, 16 Ala. 806; *Worthy v. Patterson*, 20 Ala. 172; *Davis v. Dickey*, 23 Ala. 848; *Foster v. Rodgers*, 27 Ala. 602; *Herring v. Skaggs*, 62 Ala. 180; *Tatum v. Mohr*, 21 Ark. 349; *Murry v. Meredith*, 25 Ark. 164; *Hughes v. Bray*, 60 Cal. 284; *McLennan v. Ohmen*, 75 Cal. 558; *Smith v. Mayer*, 3 Col. 207; *Murray v. Jennings*, 42 Conn. 9; *Clark v. Neufville*, 46 Ga. 261; *Atkins v. Cobb*, 56 Ga. 86; *Van Winkle v. Wilkins*, 81 Ga. 93; *McClure v. Williams*, 65 Ill. 390; *Wilson v. King*, 83 Ill. 232; *Carpenter v. First Nat. Bank*, 119 Ill. 352; *Street v. Chapman*, 29 Ind. 142; *Ferguson v. Hosier*, 58 Ind. 438; *Means v. Means*, 88 Ind. 196; *Hege v. Newsum*, 96 Ind. 426; *Blacker v. Slown*, 114 Ind. 322; *Johnson v. Culver*, 116 Ind. 278; *Lacey v. Straughan*, 11 Ia. 258; *McCormick v. Vanatta*, 43 Ia. 389; *Jackson v. Mott*, 76 Ia. 263; *Weybrich v. Harris*, 31 Kas. 92; *Wheeler & W. M. Co. v. Thompson*, 33 Kas. 491; *Slaughter v. M'Rae*, 3 La. Ann. 455; *Foster v. Baer*, 7 La. Ann. 613; *Thoms v. Dingley*, 70 Me. 100; *Lane v. Lantz*, 27 Md. 211; *Horn v. Buck*, 48 Md. 358; *Reggio v. Braggiotti*, 7 Cush. 166; *Tuttle v. Brown*, 4 Gray 457; *Whitmore v. South Boston Iron Co.*, 2 All. 52; *Morse v. Brackett*, 98 Mass. 205; *Case v. Stevens*, 137 Mass. 551; *Deutsch v. Pratt*, 149 Mass. 415; *White v. Brockway*, 40 Mich. 209; *Minnesota H. W. v. Bonnallie*, 29 Minn. 373; *Merrick v. Wiltse*, 37 Minn. 41; *Smith v. Steinkamper*, 16 Mo. 150; *Stearns v. McCullough*, 18 Mo. 411; *Holmes v. Boydston*, 1 Neb. 346; *Birdsall v. Carter*, 11 Neb. 143; *Perrine v. Serrell*, 30 N. J. L. 454; *Muller v. Eno*, 14 N. Y. 597; *Conor v. Dempsey*, 49 N. Y. 665; *Sharon v. Mosher*, 17 Barb. 518; *Roberts v. Carter*, 28 Barb. 462; *Rich v. Smith*, 34 Hun 136; *Hunt v. Van Deusen*, 42 Hun 392; *Sprout v. Newton*, 48 Hun 209; *Fales v. McKeon*, 2 Hilt. 53; *Beresford v. McCune*, 1 Cin. Sup. Ct. 50; *Seigworth v. Leffel*, 76 Pa. 476; *Freyman v. Knecht*, 78

by the vendee, or an assignee holding his right of action.^(*) So the damages for breach of warranty that cows are with calf, are measured by the difference between their value in that condition and in the condition they in fact are in.^(b) In the English Common Pleas it was held that payment in advance did not affect the rule in such a case. The measure is the difference at the time of the delivery between the value of goods of the quality contracted for and that of those delivered, provided the goods can then be resold. Where there is a necessary or reasonable delay in the resale, the difference is to be computed on the day of the resale.^(c) The law of Louisiana imposes on the seller the obligation of warranting the thing sold against its hidden defects, which are those which could not be discovered by simple inspection; and the purchaser may retain the thing sold, and have an action for the reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact. But such a part of the price only as will indemnify the vendee for the difference between the value of the thing as warranted and the thing actually sold, together with the expenses incurred on the thing after deducting its fruits, can be recovered.^(d)

Where the goods were to be shipped abroad, which

Pa. 141; *Garrett v. Stuart*, 1 McCord 514; *Rose v. Beatie*, 2 N. & McC. 538; *Verdier v. Trowell*, 6 Rich. L. 166; *McGavock v. Wood*, 1 Sneed 181; *Smith v. Cozart*, 2 Head 526; *Wright v. Davenport*, 44 Tex. 164; *Stark v. Alford*, 49 Tex. 260; *Routh v. Caron*, 64 Tex. 289; *Woodward v. Thacher*, 21 Vt. 580; *Thornton v. Thompson*, 4 Gratt. 121; *Eastern Ice Co. v. King*, 86 Va. 97; *Merrill v. Nightingale*, 39 Wis. 247; *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Osborne v. McQueen*, 67 Wis. 392.

(*) *Sweet v. Bradley*, 24 Barb. 549.

(b) *Richardson v. Mason*, 53 Barb. 601.

(c) *Loder v. Kekulé*, 3 C. B. N. S. 128.

(d) *Bulkey v. Honold*, 19 How. 390.

fact was known to the vendor, and the defect could not be discovered till they reached their destination, it was held that the measure of damages was the difference between the marketable value of the article contracted for on the day of arrival and the price realized by a sale of the article received, together with expenses of sale.^(*) And where the goods were sold abroad before the breach of warranty was discovered, and the plaintiff was compelled to take them back on account of the defect, and sold them again at a lower price, he was allowed to recover the difference between the prices realized at the two sales.^(b)

Upon breach of contract of warranty of quality of tobacco sold, the purchaser gave notice to the seller that he would not accept it ; the seller not receiving it back, the purchaser on notice sold it at auction. It was held that the price received at auction could be shown.^(c) Danforth, J., said : " It was for the plaintiffs to show the market value of the tobacco delivered by the defendants. For that purpose a sale at auction was properly resorted to, and its result was some evidence of the fact in question, not conclusive, but quite satisfactory in the absence of explanation or testimony from the defendants."

It results from the general rule, that it is erroneous in an action on a note given for the price of a chattel for the court to charge the jury that, although they should find the covenant to have been broken, if at the time of the sale the chattel in its unsound state was worth the price for which it was sold, the defendant had sustained no damage.^(d) Nor is the rule affected

(*) *Camden C. O. Co. v. Schlens*, 59 Md. 31.

(b) *Rose v. Beatie*, 2 N. & McC. 538.

(c) *Bach v. Levy*, 101 N. Y. 511, 515.

(d) *Hook v. Stovall*, 26 Ga. 704.

by proof that the purchaser afterwards sold the property for as much as and more than he paid for it.^(*) Where the property at the time of the sale had no market value, and it is impossible to get at its real value at that time if it had been as warranted, the price paid may be taken to represent that value.^(b) And it is sometimes said generally that the price at which the property was sold is evidence of its value at that time if as warranted.^(c) Where, in an action for damages for a breach of warranty, the consideration given for the warranted article consisted in another article which was exchanged for it, evidence of the value of the exchanged property will be allowed, as tending to show what the value of the other would have been if it had corresponded with the warranty.^(d) The price realized on a second sale is admissible as one mode of determining the value.^(e)

* Where fraud intervenes, as we shall presently see, the contract can be rescinded, the thing returned, and the price paid recovered back, or the party defrauded may stand to the bargain and recover damages for the fraud.¹ (f) **

§ 763. *Warranty of quantity or value.*—* There is sometimes a warranty of quantity, either expressed or implied; and in that case the purchaser is entitled to have the article

¹ *Campbell v. Fleming*, 1 A. & E. Hill 234, where the doctrine is considered at length in a learned note. *Kent Com.* 480; *Voorhees v. Earl*, 2 Hill 288; *Putnam v. Wise*, 1

(*) *Atkins v. Cobb*, 56 Ga. 86; *Brown v. Bigelow*, 10 All. 242; *Hunt v. Van Deusen*, 42 Hun 392.

(b) *South C. & C. S. Ry. Co. v. Gest*, 34 Fed. Rep. 628.

(c) *Thornton v. Thompson*, 4 Gratt. 121.

(d) *Chaplin v. Warner*, 23 Wis. 448. So in the analogous action for deceit: *Fisk v. Hicks*, 31 N. H. 535.

(e) *Foster v. Rodgers*, 27 Ala. 602; *Reggio v. Braggiotti*, 7 Cush. 166.

(f) *Sharon v. Mosher*, 17 Barb. 518.

made equal in quantity to what the warranty declared it to be.^{1**} So, again, there may be a warranty that the thing sold shall, without reference to its intrinsic quality or value, be worth a certain price or have a certain value in the market within a specified time. In a late case in Massachusetts the defendant had sold the plaintiff twenty shares of the stock of an express company, with a warranty that it should be "worth \$700 market value, within one year." The highest price reached by the stock during the year was \$500. At the end of the year its market value was \$330. The plaintiff insisted that the measure of damages was the difference between \$330 and \$700. But the defendant contended he was only liable to pay the difference between \$500 and \$700, and the court so held.^(*) So where the defendant guaranteed to sell bonds for the plaintiff at a certain price and time, the measure of damages is the difference between the price received and that guaranteed.^(b)

§ 764. **Avoidable consequences.**—The rule of avoidable consequences applies here as elsewhere, and if the defect can be remedied, the cost of so doing is the measure of damages.^(c) One had sold another for the price of good pork, well packed in good barrels, a quantity of pork in barrels with a warranty that the barrels would not leak. After the barrels had been properly stowed by the vendee, he found that a part of them were leaky, and the brine had in consequence escaped. He,

¹ *Voorhees v. Earl*, 2 Hill 288; *Hargous v. Ablon*, 3 Denio 406.

^(*) *Woodward v. Powers*, 105 Mass. 108.

^(b) *Plumb v. Campbell*, 129 Ill. 101.

^(c) *Benjamin v. Hillard*, 23 How. 149; *Marsh v. McPherson*, 105 U. S. 709; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; *Leathers v. Sweeney*, 41 La. Ann. 287; *Whitehead & A. M. Co. v. Ryder*, 139 Mass. 366; *Kimball & A. M. Co. v. Vroman*, 35 Mich. 310; *Wyckoff v. Horan*, 39 Minn. 429; *M'Mullen v. Williams*, 5 Ont. App. 518.

thereupon, under the advice of some experts, filled up the barrels with new brine, in good faith, intending and expecting thereby to preserve the pork ; but the barrels continuing to leak, a portion of them were either wholly spoiled or deteriorated to an extent exceeding the balance due for the pork. The vendee did not notify the vendor of the leaking of the barrels, nor offer to return the imperilled pork, nor did he repack the pork in new barrels, which it appeared it was customary and necessary to do under such circumstances. Whether the vendee, in fact, knew of this custom or necessity did not appear. Both parties were free from fraud. In an action by the vendor for the unpaid balance of the purchase-money, it was held that the vendee was entitled to no deduction on account of the loss of the pork, but only to what it would have cost to procure new barrels in lieu of the old ones and repack the pork therein.^(*) Even where a plaintiff gives notice of a special object in purchasing an article, he cannot recover damages suffered by continuing to use it when he discovers its defects.^(b) So the plaintiff is not allowed to recover the rental value of a distillery where he is prevented from using it by a defect in a pump which he knew to be defective when he placed it in the well. He is confined to the difference in value per day between what the pump would have been worth had it been as warranted, and what it was actually worth.^(c) The plaintiff should have protected himself from loss.

§ 765. Consequential damages.—* The rights of the parties in a case of warranty are not, however, always presented in the simple form that we have just been considering.

(*) *Hitchcock v. Hunt*, 28 Conn. 343.

(b) *Draper v. Sweet*, 66 Barb. 145.

(c) *Nye v. Iowa C. A. Works*, 51 Ia. 129.

The vendee, in some instances, confiding in the warranty, is subjected to indirect or consequential loss. And the recovery of such consequential loss will depend on the general principles which we have heretofore examined. So where a slave was sold with warranty of soundness, and two months afterwards received a gunshot wound and died, and it was proved that he had labored under a chronic affection of the lungs at the time of the sale, and but for that disease the wound would not have proved mortal; it was held, notwithstanding, that the vendor was liable only for the diminution of his value at the time of the sale in consequence of the disease, and not for the combined consequences of the wound and the disease.¹***

In *Randall v. Newson*,^(*) the plaintiff had bought of the defendant a pole for his carriage. In driving, the horses swerved and the pole broke short off at the carriage. The horses became restive and were injured. The court below had refused to allow damages for this injury. In Banc this was held to be error, the court saying: "We think that a question should have been left to the jury similar to that which was left in *Smith v. Green*,^(b) namely, whether the injury to the horses was or was not a natural consequence of the defect in the pole." In *Zuller v. Rogers* ^(c) it was held that for breach of warranty of the soundness of a canal-boat, the plaintiff was liable not only for the difference in value, but also for special damages sustained by reason of delays, loss of time, and other injury suffered unavoidably on the first trip before the defects were discovered. Where plaintiff was to take care of sheep for half the wool and half the lambs, defendant

¹ *Marshall v. Gantt*, 15 Ala. 682.

(*) 2 Q. B. D. 102, 111.

(b) 1 C. P. D. 92; cited *infra*, § 769.

(c) 7 Hun 540.

falsely representing that they were in good condition, and many died from disease, the measure of damages was held to be the cost of taking care of them and the value of the time spent, less the profits made under the contract.^(*) Where a boiler, warranted sound, exploded and injured the plaintiff's mill, it was held that the rental value of the mill during the necessary repairs might be recovered.^(b) Where white-lead had been spilled on the defendant's hay, and he had partially separated the poisoned hay from the rest, and wrongly supposed he had done so completely, and under this impression sold some of the remaining hay to the plaintiff, and the plaintiff's cow died from eating the hay, it was held that the defendant was liable, and that the rule of damages was the value of the cow.^(c)

We proceed to consider some of the more common instances of the allowance of consequential damages.

§ 766. Upon warranty of fitness for a purpose.—Where an article is warranted fit for a particular purpose, the purchaser can recover the damages caused by an attempt to use it for that purpose.^(d) This sometimes gives a larger measure of recovery than would be allowed under the ordinary rule. Where the chattel sold has different values, according to the use for which it is intended, the value which measures the damage is that which the vendor represented it to have with reference to the purpose to which he knew it was to be applied by the vendee. So where oxen purchased for work, and represented sound,

(*) *Parker v. Marquis*, 64 Mo. 38.

(b) *Sinker v. Kidder*, 123 Ind. 528.

(c) *French v. Vining*, 102 Mass. 132; *acc. Wilson v. Dunville*, 6 L. R. Ir. 210.

(d) *McLennan v. Ohmen*, 75 Cal. 558; *Fox v. Stockton C. H. & A. Works*, 83 Cal. 333; *Cochran v. Jones*, 11 S. E. Rep. 811 (Ga.). This rule has been held not to authorize a recovery of the value of goods stolen from a safe warranted burglar-proof; *Herring v. Skaggs*, 62 Ala. 180.

proved unsound, and by reason of the unsoundness were worth ten dollars less for beef and twenty-five dollars for work, the larger sum was held to be the measure.^(*) And where oxen sold were warranted easily yoked by an old man, and were not, the measure of damages is the difference between the value of oxen as warranted and the value of the oxen sold.^(b) So where a refrigerator was warranted to keep chickens frozen for market, the measure of damages was the diminished value of the refrigerator, and the value of chickens lost, reckoned at their value in the market at the time to which the refrigerator was warranted to keep them, less the expense of reaching market and selling.^(c) Where coloring matter purchased for the purpose of coloring ice-cream by a manufacturer of that article proved to be poisonous, the purchaser was allowed to recover the value of the ice-cream lost through the use of the poisonous coloring matter, and also compensation for injury to business.^(d)

Where steel sold proved to be of an inferior description to what it was warranted to be, the purchaser, having used the steel in the manufacture of axes, was allowed to recover the difference between the value of these axes and that of axes made of the quality of steel this was described to be. The court stated that the reason of these decisions was that the plaintiff could not have discovered the defect before the axes were manufactured, and therefore could not replace himself till then.^(e) Where varnish was warranted fit to varnish wood mouldings, and upon being used for that purpose proved to be

(*) *Ladd v. Lord*, 36 Vt. 194.

(b) *Wing v. Chapman*, 49 Vt. 33.

(c) *Beeman v. Banta*, 118 N. Y. 538.

(d) *Swain v. Schieffelin*, 12 N. Y. Suppl. 155.

(e) *Parks v. Morris A. & T. Co.*, 54 N. Y. 586; *acc.* *Milburn v. Belloni*, 39 N. Y. 53.

of an inferior sort, the measure of damages was held to be the difference in value of the mouldings varnished as they should have been and as they were.^(*) In any case actual loss may be recovered. On breach of warranty of steel furnished for manufacturing into vises, the measure of damages is the cost of the labor and material wasted, with interest.^(b) In case of warranty of steel springs sold to manufacture carriages, the purchaser may recover the expense of taking defective springs out of carriages manufactured and replacing them by new ones.^(c)

§ 767. *Upon warranty of machines.*—Under the foregoing head would properly come cases of warranty of machines. Where a machine turned out not to be what it was warranted, it was held that the plaintiffs could not recover for profits lost during the time which was required to put it in the condition it was warranted to be.^(d) So in an action for breach of a contract to construct and set up, within a specified time, engines on a steamboat of a stipulated quality and power; where it proved that the engines were not delivered within the time fixed by the contract, and did not conform to it, the measure of the plaintiff's damages was held to be the difference between the machinery furnished and that called for by the contract, together with expenses actually incurred by the plaintiff as a consequence of the breach, which would include the wages of the officers and crew while they remained idle during the delay in furnishing the machinery, and such reasonable further time as was consumed in testing and repairing it, or procuring other machinery in-

(*) *Moore v. King*, 57 Hun 224.

(b) *Bagley v. Cleveland R. M. Co.*, 22 Blatch. 342.

(c) *Thoms v. Dingley*, 70 Me. 100.

(d) *Booher v. Goldsborough*, 44 Ind. 490.

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stead, to which might be added interest.^(a) *McCormick v. Vanatta* ^(b) was an action for breach of a warranty that a reaping and mowing machine would reap and rake small grain or flax, in all conditions, as well as it could be done by hand. The vendee claimed to recover for loss of part of his crop by a delay which was due to defects in the machine sold. The court refused to give such damages, holding that such a consequence was too remote, and saying that the true measure of damages was the difference in the value of the machine as it was and as it should have been. But if it had been within the contemplation of the parties at the time of the contract that it would be impracticable to procure another machine to do the work and save the crop, it has been intimated that the loss would be recoverable.^(c) Where the warranted machine was bought for the manufacture of cotton-seed oil, the plaintiff may recover the deterioration in value of cotton-seed bought to run in the machine.^(d)

§ 768. *Of seeds.*—We have already discussed the cases turning upon warranty of seeds, and shown how they illustrate the principles of consequential damages.^(e) It is not necessary to do more than summarize the results here. Where seed is warranted to be of a certain quality and turns out to be of an inferior quality, the purchaser is not (*where the seed grows, and produces a crop*) confined to the difference between the price of seed of one quality and that of the other. He has been allowed to recover the difference between the value of a crop produced by the seed delivered and the value a crop produced by other

^(a) *Fisk v. Tank*, 12 Wis. 276.

^(b) 43 Ia. 389; *acc.* *Frohreich v. Gammon*, 28 Minn. 476; *Wilson v. Reedy*, 32 Minn. 256.

^(c) *Frohreich v. Gammon*, 28 Minn. 476.

^(d) *Van Winkle v. Wilkins*, 81 Ga. 93.

^(e) § 191.

seed would have had. In the case of *Randall v. Raper* ^(*) the defendant had sold the plaintiff some barley, warranting it to be "Chevalier seed barley." The plaintiff on the faith of that warranty had resold it with a similar one. The barley proved to be not "Chevalier seed barley," but of an inferior quality, in consequence of which the plaintiff's vendee obtained a poor crop. It was held that the plaintiff was entitled to recover the amount to which he had become liable to the vendee, although it was unliquidated as between him and his vendee. In *Passenger v. Thorburn*, ^(b) the last cited case was approved by the New York Court of Appeals, in a judgment affirming that of the court below. ^(c) The defendant sold cabbage seed, warranting that it would produce Bristol cabbages, and the plaintiff having sowed it in the anticipation of producing that crop, the warranty proved untrue. The damages were held to be the value of a crop such as should have been produced by the seed that year, had it conformed to the warranty, deducting the expense of raising the crop, and the value or product of the one in fact raised. The strong cases of *Borradaile v. Brunton*, ^(d) and *Brown v. Edgington*, ^(e) with other English cases to the same purport, are cited and approved; and the doctrine of *Hadley v. Baxendale* is applied to its full extent to the case of a breach of warranty. So also, in the case of *Flick v. Wetherbee*, ^(f) the lessor of farming land having covenanted to supply seed, was held bound to supply good seed,

(*) 1 E. B. & E. 84.

(b) 34 N. Y. 634; *acc.* *Wolcott v. Mount*, 36 N. J. L. 262; *White v. Miller*, 71 N. Y. 118; *contra*, *Hurley v. Buchi*, 10 Lea 346.

(c) 35 Barb. 17.

(d) 8 Taunt. 535.

(e) 2 M. & G. 279.

(f) 20 Wis. 392.

and the same measure was applied to the lessee's damages by reason of a partial failure of the crop in consequence of the inferiority of the seed furnished. But, on the other hand, a more restricted rule has been adopted in the case of seeds *which do not in fact grow*. There the value of a possible crop is too conjectural. In such cases the damages should be the cost of the seed, the value of the labor in preparing the ground for it (less the general benefit to the land from such labor), the value of the labor in planting it, with interest on the several amounts.^(a) *Where the seed grows, but does not produce a crop*, the rule is that the loss of crop is not too conjectural.^(b) Where seed was sold as prime clover seed, but contained plantain, it was held that the purchaser could recover the expense of uprooting the plantain.^(c)

§ 769. **By communication of disease.**—Where animals sold are warranted free from disease, loss through communication of disease to other animals of the purchaser may be recovered.^(d) It is not necessary to the recovery of such damages to show that the vendor knew that the diseased animal was to be placed with others belonging to the plaintiff.^(e) The defendant is presumed to anticipate that the animals he sells will be placed with others as a natural consequence of his act.^(f) The expense of

(a) *Ferris v. Comstock*, 33 Conn. 513; *Butler v. Moore*, 68 Ga. 780.

(b) *Schutt v. Baker*, 9 Hun 556.

(c) *Fox v. Everson*, 27 Hun 355.

(d) *Mullett v. Mason*, L. R. 1 C. P. 559; *Smith v. Green*, 1 C. P. D. 92; *Knowles v. Nunns*, 14 L. T. R. 592; *Wheeler v. Randall*, 48 Ill. 182; *Sherrod v. Langdon*, 21 Ia. 518; *Joy v. Bitzer*, 77 Ia. 73; *Broquet v. Tripp*, 36 Kas. 700; *Faris v. Lewis*, 2 B. Mon. 375; *Bradley v. Rea*, 14 All. 20; *Long v. Clapp*, 15 Neb. 417; *Jeffrey v. Bigelow*, 13 Wend. 518; *Wintz v. Morrison*, 17 Tex. 372; *Routh v. Caron*, 64 Tex. 289; *Packard v. Slack*, 32 Vt. 9. See § 131.

(e) *Packard v. Slack*, 32 Vt. 9.

(f) *Sherrod v. Langdon*, 21 Ia. 518.

nursing and curing other animals, which contract disease from those sold, may be recovered.^(*)

§ 770. Upon a sub-contract.—No recovery can be had for delay in executing existing contracts on account of the breach of warranty where the fact of such contract was not made known to vendor.^(b) Where pianos turned out to be defective, it was held that the plaintiff could not include transportation to and from sub-purchasers and hire of other pianos during time of repair.^(c) But where it is known to the defendant that the property was bought to fill a contract, the plaintiff may recover the profits of the sub-contract.^(d)

In a case in the Irish Exchequer^(e) the plaintiff sued for breach of warranty on a sale of scrap iron. The defendant had notice at the time of purchase that the contract was made in order to enable the plaintiff to accept an offer for such iron from one Wright, in Philadelphia; after making the contract with the defendant, the plaintiff accepted Wright's offer, which was for a price found by the jury to be not an unusual advance over the purchasing price. It was held that the plaintiff could recover the difference between the actual value of the iron delivered by the defendant and the price he would have received on the sub-contract. Palles, B., said :

"In the well-known case of *Hadley v. Baxendale* it was attempted to lay down a rule for the application of this principle. But (although possibly it may not much affect the particular case before us) I must repeat, what in common with other judges I have frequently pointed out, that the words in which the rule

(*) *Long v. Clapp*, 15 Neb. 417.

(b) *Weybrick v. Harris*, 31 Kas. 92.

(c) *Snow v. Schomacker Mfg. Co.*, 69 Ala. 211.

(d) *Carpenter v. First Nat. Bank*, 119 Ill. 352. See § 162.

(e) *Hamilton v. Magill*, 12 L. R. Ir. 186, 202.

is there stated are not strictly accurate. Generally, when parties enter into a contract, they do not contemplate its breach, or the probable result of that breach; and I think that the rule intended to have been there laid down would be more accurately expressed by stating that the damages recoverable were such as might arise naturally (*i. e.*, according to the usual course of things) 'from such breach of contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of the contract.' In other words, that that which is required to have been in the contemplation of the parties at the time of the contract is not the probable result of the breach, but the circumstances by reason of which the breach (if there were one) would result in a loss greater than the normal one. . . . The variations between the sold note offered and that ultimately signed demonstrate, first, that to the knowledge of the defendant the special purpose for which this iron was purchased from him was to enable the plaintiffs to accept that offer; secondly, that to his knowledge such offer was one that could not be fulfilled otherwise than by a shipment on or before the 19th of April; . . . thirdly, as by the contract the defendant had until the 19th of April to ship the cargo in question, the parties could not have contemplated the possibility of the plaintiffs procuring other iron for shipment to Wright instead of the defendant's, in the event of the latter not answering the description contracted for. The state of facts, therefore, which they had in their contemplation necessarily led to this, that a breach of his contract by the defendant would involve a breach by the plaintiffs of their contract with Wright, and the loss of their right to compel acceptance by Wright of that cargo."

§ 771. Purchase for sale at a distance.—* In a case¹ where the defendant had sold the plaintiff certain merchandise, called in the bill of parcels scarlet cuttings, intended for the China market, which turned out not to be so, Lord Ellenborough held that such a description implied a warranty that they were the article named, and charged that the plaintiff was entitled to recover such a sum as he would have received had the warranty been true with

¹ *Bridge v. Wain*, 1 Stark. 504.

reference to the China market; the value to be recovered being the value which the plaintiff would have received had the defendant faithfully performed his contract.** So where a quantity of pork, although contracted for delivery at one place, was known to the vendor to be intended for use by the vendee at another place, and when it had reached the latter proved to be damaged, the difference in value at the ultimate point was held to furnish the measure ;^(*) and in an action for breach of warranty, where the seller knew the articles were bought for a customer of the purchaser at Salt Lake City, it was said that the purchaser should recover the difference between the value of the articles at the place where the contract was made and the worth when delivered, *plus* the cost of transportation and the profits the plaintiff would have made by a resale.^(b) But this rule was not followed in New York. The defendant sold plaintiff a quantity of apples, to be delivered at Barre, in New York. At the time of the sale it was agreed that the apples were to be "good ingrafted winter fruit," and it was understood that they were intended to be put up for the Canada market. They were accordingly delivered to the plaintiff at Barre, and he took them to Toronto, Canada, where the barrels were opened, and some of the apples found to be damaged. *Held*, in an action for breach of warranty, that the true measure of damages was not the difference between the real value of the apples, as they proved to be, and the price of good merchantable fruit *in the Canada market*, deducting the price of transportation to that place, but the difference in value between a sound and the unsound article *at the place of delivery*; and that the

(*) *Converse v. Prettyman*, 2 Minn. 229.

(b) *Thorne v. McVeagh*, 75 Ill. 81.

plaintiff was not entitled to recover anything on the ground of a loss of profits. If the apples had been wholly lost in consequence of the fault of the vendor, the vendee might recover the expenses of transportation to the contemplated market, in addition to the price paid for the fruit. But he could in no event go beyond that, and recover anything on the ground of a loss of profits.^(*) Under the general view now taken of the rule in *Hadley v. Baxendale*, this last case would hardly be followed.

§ 772. **Expenses.**—In a suit on the warranty of a slave, reasonable medical and other expenses, sustained by reason of the unsoundness warranted against, have been included in the damages,^(b) with interest from the time of payment.^(c) Nor is the right of recovery made to depend on the fact of payment. It is enough that they have been fairly incurred.^(d) In Arkansas, on breach of warranty as to the soundness of a slave, the plaintiff was allowed to recover the expenses necessarily incurred in consequence of the unsoundness, but not interest on the value.^(e) In those cases of breach of warranty of soundness in the sale of animals, where the rule of compensation cannot be enlarged so as to include consequential damages, the jury should be instructed as to what evidence tends to show the difference in value between the animals sound and unsound, and what recoverable expenses have been seasonably, properly, and reasonably incurred in taking care of them

(*) *Lattin v. Davis*, Hill & Denio Supp. 9.

(b) *Buford v. Gould*, 35 Ala. 265; *Stone v. Watson*, 37 Ala. 279; *Feagin v. Beasley*, 23 Ga. 17; *Perrine v. Serrell*, 30 N. J. L. 454.

(c) *Roberts v. Fleming*, 31 Ala. 683.

(d) *Kelly v. Cunningham*, 36 Ala. 78.

(e) *Tatum v. Mohr*, 21 Ark. 349.

and trying to cure them.^(a) And in an action for breach of warranty of soundness of a slave who had died, the measure of damages was held to be the price paid and interest, and if the vendee offered to return the slave, and the offer was refused, the subsequent expenses of his keeping.^(b) And on the same principle the plaintiff is entitled to recover the expenses of keeping an animal for such a reasonable time as may be necessary to sell him to the best advantage.¹

§ 773. **Litigation expenses.**—* The vendor may be liable for the expenses of litigation incurred in consequence of his warranty. It seems when the chattel has been sold a second time by the vendee, relying on the original warranty, and he is prosecuted by the second vendee, and recovery had, the first vendor, if duly notified of the claim, and it is not unnecessarily resisted, is liable for the whole amount of the damages and costs recovered against the first vendee by the second vendee, as well as his costs of defense.^(c) So in an action on the warranty of a horse, the defendant had sold the horse to the plaintiff with warranty, and the plaintiff had resold with warranty to one Dowling. Dowling sued the plaintiff, and recovered the price of the horse, with £88 costs. The plaintiff had given the defendant notice of Dowling's action. This action was brought for the price of the horse and the costs, and the plaintiff had a verdict for the whole amount. On a motion for a new trial, and to set aside the verdict as to

¹ *McKenzie v. Hancock, Ryan & Chinnoek*, 7 C. & P. 169 (1835); *Clare Moody* 436 (1826); *Chesterman v. Maynard*, 7 C. & P. 741. *Lamb*, 2 A. & E. 129 (1834); *Ellis v.*

(a) *Murry v. Meredith*, 25 Ark. 164; *Pinney v. Andrus*, 41 Vt. 631; *contra*, *Merrick v. Wiltse*, 37 Minn. 41.

(b) *Scranton v. Tilley*, 16 Tex. 183.

(c) *Marlatt v. Clary*, 20 Ark. 251. Costs, but not counsel fees: *Reggio v. Braggiotti*, 7 Cush. 166; *Jeter v. Glenn*, 9 Rich. L. 374.

the costs of Dowling's action, it was urged that, if the horse was unsound, the plaintiff had incurred this expense needlessly, and in his own wrong. But the rule was refused, the court saying: that as the plaintiff received no directions from the defendant to give up the cause, the costs were a part of the damages which the plaintiff had sustained.¹

We shall see when we come to examine the subject of principal and surety in its more extended aspect, that it has been frequently held that the party, though holding a warranty, defends the suit at his peril, and that if it appear to have been unnecessarily defended, the expense will be charged on him. The only effect of notice is to shift the burden of proof. If no notice be given, the warrantee will be held to proof of the propriety of the litigation. If such notice has been given, the original warrantor will be obliged to prove that the expense was unnecessarily incurred.

Where the defendants had sold the plaintiff a picture, warranted to be painted by Claude, but in fact not painted by him; and the plaintiff sold it to a third party with like warranty; and the second vendee sued the plaintiff on the warranty, and recovered damages and costs,—it was held that if the sale was a *bona fide* sale, the plaintiff could recover the costs paid the sub-vendee, and all the costs of his own defense; nothing is said in the case of notice or the propriety of the litigation.¹ **

§ 774. Warranty of title.—* The same questions which

¹ Lewis v. Peake, 7 Taunt. 153; but it has been since held that notice is not conclusive. The same question was presented in Wrightup v. Chamberlain, 7 Scott 598, and it being found that the plaintiff, before he defended the action brought against him, might have ascertained, by a reasonable examination of the horse, that it was not sound,

the court said that the defense was a rash one, and the plaintiff not entitled to charge the defendant "with the costs of such improvident defense." And in Penley v. Watts, 7 M. & W. 601, 609, this case is spoken of as reconsidering that of Lewis v. Peake.

¹ Pennell v. Woodburn, 7 C. & P. 117.

we are now considering are sometimes presented where the warranty, instead of referring to the quality of the article, is one of title. The result of the older English authorities is, that by the law of England there is no warranty of title in the actual contract of sale, any more than there is of quality; and so it was held in a case in the Court of Exchequer.¹ But according to the Roman law,² and in France,³ and Scotland, and generally in the United States, there is always an implied contract that the vendor has a right to dispose of the subject which he sells. In an action (on the case),⁴ on the warranty of title implied in the sale of a horse, Blasdale bought the horse of Babcock, but was afterwards sued by Snow in trover for the animal; he gave notice to the defendant of the suit; and judgment was obtained against him for the value of the horse, with costs. It was held at the trial that the judgment was strong but not conclusive evidence of Snow's title; and that, if not rebutted, the measure of damages was the amount of the recovery against Blasdale in the other action (verdict and costs). And this was held right by the Supreme Court of New York.

In an action (of assumpsit) under somewhat different circumstances,⁵ the plaintiff bought a horse of the defendant for \$55 cash, and another horse valued at \$85, in all \$140; the plaintiff sold the horse to one Milligan, and shortly after, one Gordon replevied the horse of Milligan, and recovered judgment, \$72.32 for damages, and \$33.95 costs, which were paid by Milligan; Milligan also paid the costs of his own defense. The plaintiff then settled with Milligan amicably, and claimed of the defendant the original amount paid by him, and also the

¹ *Morley v. Attenborough*, 3 Ex. 500, where the English cases are examined.

² Domat, book 1, tit. 2, § 2, art. 3.

³ Code Civil, ch. 4, § 1, art. 1603.

⁴ *Blasdale v. Babcock*, 1 Johns. 517.

⁵ *Armstrong v. Percy*, 5 Wend. 535.

damages and costs paid by Milligan and repaid by the plaintiff to him. The cause was referred; and the defendant insisted that the measure of damages was the price of the horse, with the interest thereof, deducting his services since the sale to the plaintiff, and that the plaintiff was not entitled to recover the costs and expenses in the replevin suit of Gordon. On a motion to set aside the report, the court held that the referees should have allowed the plaintiff the price paid by the defendant for the horse, and interest, together with the costs which he became liable to pay Gordon, in the suit brought to establish his title; and the expenses paid by Milligan in his own defense were disallowed.^(*) It may be proper to observe that the court here appears to have lost sight of the principle laid down in the cases already cited, that the recovery should be estimated, not by the price paid, but by the real value. If this rule is true in regard to a warranty of soundness, there seems no reason why it should not apply to a warranty of title. **

The general rule is that the measure of damages for breach of a warranty of title to a chattel is the value of the chattel at the time of the purchase, with interest, and the necessary costs of defending a suit brought against a vendee to test the title, with interest from the time of payment.^(b) But the vendee may disaffirm the contract and recover the consideration paid, though that is greater

(*) Defendant sold to plaintiff a patent right for two counties, but the title failed as to one; the measure of damages was held to be that proportion of the purchase price which the value of that part of the right to which the title failed bore to the whole value. *Moorehead v. Davis*, 92 Ind. 303.

(b) *Rowland v. Shelton*, 25 Ala. 217; *Johnson v. Blanks*, 34 Mo. 255; *Brown v. Woods*, 3 Coldw. 182. In Tennessee the courts have applied to actions on covenants for the failure of title to chattels the same measure as in the case of land, which in that State is the price paid and interest. *Critenden v. Posey*, 1 Head 311.

than the value of the property.^(*) Where a steamboat sold was warranted free from liens, but was subsequently seized under a lien, and while in custody was burned, the purchaser has been allowed to recover only the amount of the lien and the cost of disputing it, the destruction of the boat being considered too remote a consequence.^(b)

§ 775. *Warranty of indorsements.*—* It has been held in Massachusetts,¹ that where a warranty is given that the indorsements on a note are genuine, and they prove to be forged, “the measure of damages will be the difference between the amount of the note and its actual value, whatever that may be.”**

* It has been decided in the same State, in an action of assumpsit, brought on a warranty of an indorsement as genuine, that the plaintiff was entitled to recover, as part of his damages, the costs incurred by him in an unsuccessful suit against the supposed indorser, if the plaintiff commenced the suit in good faith, not knowing that the signature was forged, and gave the warrantor seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature; and the court held that the rule established in actions for a breach of the covenant of warranty in the conveyance of real estate, must govern the case.¹**

¹ Coolidge v. Brigham, 1 Met. 547.

² Coolidge v. Brigham, 5 Met. 68; Swett v. Patrick, 12 Me. 9. In Alabama, it is held that, in an action by the vendee of personal property against the vendor, upon a warranty of title, a judgment against the vendee, at the instance of a third person, claiming to be the rightful owner, of which suit the vendor had no notice, is not evidence to prove that the title of the latter was defective. But it seems that

such judgment is admissible to prove the amount of damages recovered, and is conclusive of the validity of the vendor's title, if it was obtained without fraud or collusion, upon notice given to him of the pendency of the action. And the measure of damages in an action for a breach of a warranty of title on the sale of personal property, cannot exceed the damages sustained by the vendee. *Salle v. Light*, 4 Ala. 700.

(*) *Wilkinson v. Ferree*, 24 Pa. 190.

(b) *Harper v. Dotson*, 43 Ia. 232.

In Wisconsin, the measure of damages on breach of an implied warranty of an indorsement has been held to be the difference between the values of the note with and without the indorsement, and the costs and reasonable expenses of suing the other indorsers, the question of notice not being raised. The defendant was allowed to show the insolvency of the indorser.^(*)

§ 776. **That a certain sum is due.**—In an action for breach of such a warranty, the warrantee can recover what the note of such a maker would be worth, *e. g.*, what a judgment against him would be worth. *Prima facie*, the amount recoverable would be the whole amount due on the note at the time the suit was brought.^(b) So where the assignor of a judgment covenanted that there was due a certain sum, and that he would not discharge the judgment, it being proved that he had previously discharged one judgment debtor, the plaintiff was allowed to recover the difference between the actual value of the judgment and the value it would have had if the debtor had not been discharged, and this although the price paid was only ten per cent. of the amount of the judgment.^(c) Where at the defendant's request suit had been brought without success by the plaintiff, he may recover the costs of that suit.^(d)

§ 777. **Fraud in sale of chattels.**—In a case in New York,¹ the Court of Appeals said: "The measure of damages in an action upon a warranty, and for fraud in the sale of personal property, are the same. In either case they are determined by the difference in value be-

¹ *Whitney v. Allaire*, 1 N. Y. 305, 312.

(*) *Giffert v. West*, 33 Wis. 617.

(b) *Head v. Green*, 5 Biss. 311.

(c) *Bennett v. Buchan*, 61 N. Y. 222.

(d) *Smith v. Corege*, 14 S. W. Rep. 93 (Ark.).

tween the article sold, and what it should be according to the warranty or representation," and this has usually been stated as a general rule.^(*) So where the defendant sold to the plaintiff a bond and mortgage, which afterwards proved voidable, at less than the face value, and the plaintiff's recovery on the bond was restricted to the amount he had paid, he was allowed to recover of the defendant the difference between the face of the bond and the amount he had recovered upon the bond.^(b) In *Grissler v. Powers* ^(c) the court said :

"The estoppel created by a false representation acted upon is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented was true, and when the representation is made on the sale of a chattel or security, the remedy of the purchaser is not limited to a recovery simply of the money advanced, if the purchaser would receive a benefit beyond that if the facts had been as represented."

Where the defendant sold to the plaintiff slaves in which, as it proved, the vendor had only a life estate, the same general rule was followed, but it was held that what occurred between the sale and the trial should be considered, such as the death of a slave, and an improvement in the health and probable length of life of the defendant.^(d)

* So, where ¹ case was brought for fraud and deceit in

¹ *Sherwood v. Sutton*, 5 *Mason* 1, 9.

(*) *Cooper v. Schlesinger*, 111 U. S. 148; *Morton v. Scull*, 23 *Ark.* 289; *Thompson v. Bertrand*, 23 *Ark.* 730; *Herfort v. Cramer*, 7 *Col.* 483; *Morse v. Hutchins*, 102 *Mass.* 439; *Young v. Filley*, 19 *Neb.* 543; *Fisk v. Hicks*, 31 *N. H.* 535; *Page v. Parker*, 40 *N. H.* 47; 43 *N. H.* 363; *Carr v. Moore*, 41 *N. H.* 131; *Noyes v. Blodgett*, 58 *N. H.* 502; *Hubbell v. Meigs*, 50 *N. Y.* 480; *Miller v. Barber*, 66 *N. Y.* 558; *Graves v. Spier*, 58 *Barb.* 349; *Mason v. Raplee*, 66 *Barb.* 180; *Wyeth v. Morris*, 13 *Hun* 338.

(b) *Grissler v. Powers*, 81 *N. Y.* 57; *Miller v. Zeimer*, 12 *Daly* 126.

(c) 81 *N. Y.* 57, 61.

(d) *Campbell v. Hillman*, 15 *B. Mon.* 508.

the sale of a vessel, which was represented to be British, whereas in fact she was Spanish, Story, J., before whom the cause was tried, held the rule of damages to be the difference between the value of the vessel if she had been what she was represented to be, and her actual value, together with such part of the costs of repairs laid out on her, on faith of the false representations, as the jury should see fit to allow. He said :

“ The true rule of damages in cases of this nature is, to allow the difference between the value of the vessel, if her real character had been known, and the price at which she was bought, under the faith of her being a vessel entitled *bona fide* to the privileges and benefits of such a *British* character. To this extent, at least, he has sustained a loss. Now, it is in proof that, as a *Spanish* vessel, at the time of the purchase, she was not worth more than \$500, that is, than the value of her materials, if she were broken up. As a *British* vessel, she was worth \$1,500, and on the faith of the representation made of her possessing such character, the plaintiff gave that sum for her. The difference between the sum is a loss actually sustained by the plaintiff ; for he had paid \$1,000 more for the vessel than she was worth, and that upon a false representation of the defendant. But it further appears that, upon the faith of this representation, the plaintiff went on and expended about \$1,900 in repairs ; and I am of opinion that of this sum the jury are at liberty to allow the plaintiff such portion as they deem reasonable, to remunerate any loss for which the plaintiff has not received any indemnity or compensation by the subsequent earnings of the ship or otherwise ; for the loss was a direct consequence of the fraudulent representation.”

So, again, where fraud has been practiced in a sale, as of a horse, the measure of damages is, as in an action for the breach of warranty, the difference between the value of the article sold and the value of such an article as it was represented to be, even if, at the time of the sale, the property was fairly worth the price paid.¹ **

¹ *Stiles v. White*, 11 Met. 356.

The contract price is frequently taken as the value of the property represented,^(a) and in the absence of other evidence of value, it is properly so taken. If the plaintiff rescinds the contract on account of the fraud, upon returning the consideration he may recover the purchase-money and interest.^(b)

§ 778. *Smith v. Bolles*.—In a recent case in the Supreme Court of the United States, however, that tribunal seems to have refused to follow this well-established rule. It was an action of tort for fraud in the sale of stock ; and it was held that the measure of damages was not the same as upon breach of warranty, but was compensation for the injury done by the fraud, that is, the purchase-money less the actual value of the stock.^(c) Fuller, C. J., said :

“The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it ; nor if the stock were worthless could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been

(a) *Estell v. Myers*, 56 Miss. 800 ; *Carr v. Moore*, 41 N. H. 131.

(b) *Hauk v. Brownell*, 120 Ill. 161.

(c) *Smith v. Bolles*, 132 U. S. 125, 129 ; followed in *Atwater v. Whiteman*, 41 Fed. Rep. 427 ; and in *Glaspel v. The Northern Pac. Ry. Co.*, 43 Fed. Rep. 900 ; both these cases being actions for deceit in the sale of land. In *Buschman v. Codd*, 52 Md. 202, the same rule was applied where the misrepresentation related to a business sold.

made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct, but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.

"Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages. 'The damage to be recovered must always be the *natural* and *proximate consequence* of the act complained of,' says Mr. Greenleaf;^(*) and 'the test is,' adds Chief-Justice Beasley in *Crater v. Binninger*,^(b) 'that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract.'"

The *ratio decidendi* of this case would seem to be that the action is brought, not upon the contract of warranty, but for a tort. Compensation is asked for loss caused by the defendant's *false statements*; and to determine its amount, the question should be, what greater amount of property would the plaintiff have if the defendant's statements had not been made? The plaintiff's loss is not the value of his bargain; for it is necessary to the very maintenance of the action to show that the bargain would not have been made if the defendant had not made the false statements complained of. If these had not been made, therefore, the plaintiff would have the consideration he paid, but nothing more; and the difference be-

(*) Vol. 2, § 256.

(b) 33 N. J. L. 513.

tween that consideration and the actual value of the property represents all the loss that was caused by the defendant's tort. It is usually said that if the statements had not been false the plaintiff would have property of the quality represented, which he loses by the defendant's wrong, and, therefore, that his loss is measured by the rule as ordinarily stated. To this the answer seems to be that the defendant's tort did not consist in the *false-ness* of the statement, but in the *making* of the statement fraudulently; the result of the tort being not to change the value of a bargain, but to cause the plaintiff to part with his property against his will. The whole value of the consideration would be the amount to be recovered, if the rule of reduction of damages did not require the value of property obtained by the defendant's act to be subtracted.

§ 779. *English rule.*—And this is the rule in England. In *Peek v. Derry*,^(*) an action for false representations in the sale of shares, Cotton, L. J., delivering the opinion of the Court of Appeal on the question of damages, said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4,000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4,000 and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares, instead of having in his pocket the £4,000. The loss, therefore, must be the difference between his £4,000 and the then value of the shares." And Sir James Hannen added: "The question is, how much

(*) 37 Ch. Div. 541, 591, 594.

worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4,000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got."

§ 780. **Results of the doctrine of *Smith v. Bolles*.**—It is to be observed of these cases that not only do they overthrow what has always been considered to be the general rule, but it necessarily follows that if the plaintiff is able to dispose of the property for as much as he paid for it, he cannot recover substantial damages. Under the decision in *Smith v. Bolles* only nominal damages, at most, could be recovered in such a case, and it might be that the fraud would be treated as *damnum absque injuria*, and no action could be maintained.

§ 781. **General conclusions.**—With this remarkable difference of authority on a point hitherto supposed to be well settled, we may be permitted to offer one or two suggestions. The theory adopted in England and by the Supreme Court of the United States is that a totally different rule obtains if the plaintiff sues in contract from that which holds good if he sues in tort; that in a suit upon a *warranty* that an article corresponds with representations, he gets the benefit of his contract; while in a suit for the *fraud* committed he gets back only the money paid out. Such a result is objectionable, since it introduces two different rules for the same state of facts, dependent solely on the question whether the action sounds in tort or contract; while, as we have often seen, the general principle is, that the rules of compensation are the same in tort and contract, in all cases where the measure of damages is loss of or injury to property rights.

But besides this, the tort may be one of a peculiar character. The decisions just cited treat it as merely a

tort by means of which the plaintiff is induced to *part with his money*, or to exchange his money for the thing bought. But is this always the fact? It may be a fraudulent warranty which induces the plaintiff to enter into a contract to purchase, *not what he gets*, but something totally different. What is the natural and proximate loss in such a case? Not the loss of his money, but the loss of the thing he was induced to believe he had got. He does not seek to recover the benefit of a bargain on a contractual ground, but the benefit of a bargain which the defendant has fraudulently destroyed.

Suppose that such a warranty were made by one person and the fraud committed by another. That is, suppose that A. sells to B. with a warranty, and that C. with knowledge of the facts, by a fraud destroys the value of the warranty. In a suit by B. against C., surely the plaintiff could not be restricted to the recovery of the money he had lost, because he was obliged to sue in tort. But the supposed case is far less strong than the one we have supposed, for in that A., who sells with warranty, and C., who commits the fraud, are one and the same person.

It may be, on the other hand, that the fraud complained of is not such as would be held to be a warranty of the goods sold. In such a case the considerations just stated would not apply. The measure of damages would be the same as in any case of fraud. (*)

What is here said is intended only to apply to cases in which the fraudulent representation is also a warranty, and where the suit may be treated as sounding either in tort or contract. In *Smith v. Bolles*, whether the representation did or did not amount to a warranty, the court treated the action as sounding wholly in tort.

(*) See §§ 439-442.

FOREIGN LAW.

§ 782. **Justinian's Laws.**—* The general language of the Roman law is, that in case of the breach of contract of sale by non-delivery, the measure of damages is all that the buyer loses or fails to gain in relation to the thing itself, over and above the price paid; *id quod interest propter rem ipsam non habitam*. And, embarrassed by no form of action, the civil law inquires in each case into the motives of the defendant, and apportions the damages according to his delay, fault, or fraud.

The language of the Digest on the subject of damages for non-delivery is as follows: *Si res vendita non tradatur, in id quod interest agitur; hoc est quod rem habere interest emptoris.*¹ *Si traditio rei venditæ, juxta emptoris contractum, procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratus præses provinciae, tantum in condemnationis taxationem deducere curabit. Hoc autem pretium egreditur, si pluris interest quam res valet, vel empta est.* And so, again, *Quum per venditorem steterit quominus rem tradat, omnis utilitas emptoris in æstimationem venit, quæ modo circa ipsam rem consistit. Neque enim si potuit ex vino (puta) negotiari et lucrum facere, id æstimandum est: non magis quam si triticum emerit, et ob eam rem quod non sit traditum, familia ejus fame laboraverit. Nam pretium tritici, non servorum fame necatorum, consequitur. Nec major fit obligatio quod tardius agitur, quamvis æstimatio crescat, si vinum hodie pluris sit: merito; quia, sive datum esset, haberet emptor, sive non; quoniam saltem hodie dandum est quod jam olim dare oportuit.*

The form of action prescribed against the seller of any merchantable commodity, who was in fault for not deliv-

¹ Pandects by Pothier, vol. 7, pp. 120, 121, lib. xix, tit. 1, de Actionibus Empti et Venditi.

ering, was the *Condictio triticiaria*;¹ and when treating of this subject, the Digest says: *Si merx aliqua, quæ certo die dari debebat, petita sit; veluti vinum, oleum, frumentum, tanti litem æstimandum Cassius ait, quanti fuisset eo die quo dari debuit; si de die nihil convenit, quanti tunc judicium acciperetur.*²

But these and other texts of the Justinian law on this subject, as on many treated of in that wonderful repository of acute and profound but ill-arranged decisions, are contradictory and perplexing. And their general terms throw little light on the complex relations of modern commerce.**

§ 783. Civil law authorities.—*The modern writers of the civil law furnish us with but little assistance on the questions which we have considered in this chapter. Even the masterly treatises of Pothier, and the profound commentary of his favorite author, Molinæus or Dumoulin, on this subject, are rather to be referred to for the purpose of philosophical speculation than as authorities for our guidance.³ The total diversity of our forms of action, together with the far greater arbitrary discretion exercised

¹ *Condictio triticiaria* a tritico, tanquam nobilissimo mercium genere, vel a primis edicti verbis dicta, est actio personalis arbitraria ad rem quamlibet, præter pecuniam numeratam spectans, et ex quâcumque causâ debitam, vel etiam nostram, ex causis quibus condici potest, veluti ex causâ furtivâ vel re mobili vi abrepta. Vicat: Vocabularium Utriusque Juris, in voc. Conf. Hevelke, Juristisches Wörterbuch.

The original Roman proceeding, *per conditionem*, one of the earliest of their curious and complex forms of action, and the true character of which had become dubious even in the time of Gaius, took its name from the act peculiar to it, namely, the *condictio*, or notice given by the plaintiff to the defendant, to be present on the thirtieth day to select a judge, ut ad iudicem capiendum, die tricesimo adesset. Das Römische Pri-

vat Recht, von Wilhelm Rein, book 5. The *condictio* of the Digest, in the time of Justinian, was a more modern form. It seems to have been analogous to our action of debt, in that it demanded some certain thing, or a sum certain of money, the price of it.

² Dig. De Con. Trit. lib. xiii, tit. 3, § 4.

³ Pothier, *Contract de Vente*, part ii, ch. i, art. 5, § 79 *et seq.* and sect. 2, art. viii, § 150 *et seq.* Pothier's "Contract of Sale," translated by L. S. Cushing. Pothier allows the buyer the expense of the contract, the fees paid to the head landlord, expense of journeys to see the property, wagoners sent to fetch it, §§ 69 and 70; and the rise in price of the article, even where there has been a subsequent fall, is expressly given by § 86.

in the matter of damages by the civil law and those systems which adhere to its teaching, render its authors on this subject of comparatively little value to us.

The following is one of many instances put by Molinæus: *Venditor fundi vel domûs, recepto pretio, fuit primum in morâ tradendi: unde damnatus ad fructus vel mercedes moræ, et in id quod extrinsecus emptoris ob eam moram interfuit, quod probatum fuit ascendere ad ducenta, quæ solvit, re traditâ, sed postea evincitur, et emptor multo magis extrinsecus damnificatur: utrum in æstimatione, et interesse evictionis debeant in duplo computari illa ducenta ob præteritam moram non tradendi soluta?* § 90. Here, beyond the direct loss sustained by the delay, *extrinsic damage* is allowed.

The arbitrary discretion of the tribunal which has cognizance of the cause, is clearly stated by him in the following language: *Ut si inter mercatores et negotiatores frumentum certo die et loco: puta, tali portu promissum sit, quo tempore et loco prævidebant contrahentes creditoris interesse, et eum alioquin damna passurum, et tamen debitor per moram vel culpam etiam circa dolum malum fefellit. Ipsa enim æquitas et communis commerciorum utilitas, et fides hoc casu exigit, non solum æstimationem quanti plurimi si qua sit, sed etiam extrinsecum interesse (verumtamen propinquum et efficax prestari) quod etiam jura aperte volunt, dum hoc casu faciunt actionem arbitriam, ut videlicet detur judici judicatu arbitriam et potestas, non solum super principali et æstimatione quanti plurimi, quæ videtur pars rei, sed etiam super adjudicatione et taxatione hujus interesse.* § 97.

A large portion of this treatise is occupied with the subject of eviction. The phrase is also used by the civil law where the title to personal property fails; and here we shall see that the limit of recovery is not, as in

regard to land, the price paid, but the value of the article at the time of sale. Molinæus thus discusses the case of eviction of a slave, who, after being long serviceable to the purchaser, is finally taken from him in advanced age, by title paramount; and he well holds that the price would not be the just measure of damage against the seller in such a case. *Tum cum non venderetur res solæ nec perpetuò durabilis, sed quæ ultra certum tempus vivere et usui esse non posset, certum est non esse actum, nec cogitatum, ut frui, te habere liceret perpetuò, sed solum ad tempus vitæ, quod verisimiliter prævisum et æstimatum fuit, et ad verisimilem durationem majus vel minus definitum pretium. Igitur hoc casu pretium conventum non est pretium perpetuæ durationis, et fruitionis vitæ verisimiliter expensæ, et apreciata. Cum ergo toto ferè tempore vitæ prævisæ fructus sit emptor nec per evictionem absit nisi modicum et ferè inutile tempus non potest totum pretium repetere, cum intus habeat totum ferè commodum et fructum prævisæ fruitionis et usus.* § 127.¹

¹ Dumoulin's Treatise, De eo quod Interest (Caroli Molinæi Opera Omnia, Parisiis, 1681, vol. 3, p. 423), is a commentary on the code, De Sententiis quæ pro eo quod interest proferuntur. Cod. lib. vii, tit. xlvii. The leading clause in which is, *Sancimus itaque in omnibus casibus qui certam habent quantitatem vel naturam, velut in venditionibus et locationibus et omnibus contractibus, hoc quod interest dupli quantitatem minime excedere.*

A great portion of this treatise is now entirely valueless. Thus, no small part of it is occupied with laborious discussions of the true definition of the term interest—*interesse extrinsecum, interesse communis, interesse conventum et non conventum*, § 16; and a variety of questions growing out of the terms of the law commented on, as *quid sit illud simplum ad quod interesse singulare refertur et duplatur; qui sint casus certi et qui incerti*. § 20.

No small portion of it is devoted to refuting other glossators and discutants of similar questions, thus: *Ex quibus apparet Curt. aliorum scripta neglectim, et prefuntorie transcurrisse, et novam hanc opinionem ex capite proprio fabricasse*, § 28; and again, *Jacobus autem Renal. in suo confusaneo de his tractatib. jactat se novam opinionem afferre sed inani proluxa inepta verborisatis fumo nihil enim prorsus novi adfert, sed post multam inanem elocutionem in Bart. et communem opinionem sese revolvit, et nihil addit nisi quod confusionem auget*. § 29.

It contains, also, much discussion on the subject of evictions, of the *stipulatio dupla*, and the remote damages due in case of negligence. It is curious throughout, replete with the learning of that age, and with a vigor and subtlety which would do credit to any age, but of little practical utility to us.

No one can fail, in turning to the

HUBERUS, another very eminent master of the modern civil law, after defining damages according to the civil law, to be nothing other than the profit lost, or the injury sustained, *æstimatio damni illati et lucri cessantis*, declares the subject to be controlled by these three rules: *First*, that taken from the code, which we have elsewhere considered, that in regard to things certain the compensation shall not exceed the *double*. *Second*, that the direct and not the remote results are to be accounted for, subject, however, to the provision that, in cases of fraud, all damage sustained is to be made good; and *Third*, that in estimating injury, the general opinion, or, in regard to things vendible, the market value, and not the particular estimate of the injured party, is to govern. But it is doing injustice to the clear brevity of the original to attempt a translation: I. *In casibus certis, ubi de speciebus vel quantitativis definitis agitur, non potest excedere duplum: l. un. C. de Sent. quæ pro eo quod int.* II. *Lucrum oportet circa rem ipsam consistat, in edque sit radicatum, ut DD. loquuntur, non foris adveniens aut fortuitum: l. 21, § 3, de act. empt. Detrimenda tamen omnia præstantur si dolus intervenierit; aliter quanti minoris: l. 13, pr. d. t. de ac. empt., l. 19, § 1, locati.* III. *Lucri et damni ratio ex judicio communi, non affectione peculiari initur; nam hæc in phantasia homi-*

treatises of the great masters of the civil law, to perceive how much they are benefited by the superior harmony and logic of their system. Unembarrassed by any conflict of legal and equitable jurisdictions, unperplexed by forms of action, relieved from a great portion of our distinctions between real and personal property, and thus emancipated from a multitude of futile technicalities which have no bearing whatever on the rights of parties, their discussions have a clearness, an order, and a scientific precision, that it is in

vain to hope for under our incongruous system.

But, on the other hand, we are not without compensation. We search in vain in the pages of these writers for the accurate practical teaching of our law; and we sadly miss the sharp analysis of actually occurring cases, which gives so much interest and value to the great body of our jurisprudence, making it, instead of a mere repository of theoretical discussions, a faithful portraiture of the actual wants, interests, and passions of mankind.

*num consistit, cujus æstimatio nulla est: l. 33, ad L. Aquil.*¹

He then proceeds to illustrate these rules. A party who had let a certain pottery to another was unable to perform his agreement. The hirer proved that he could have made in a year (the term is not stated) a thousand florins, and recovered that amount. But, says the author, he should only have had judgment for 300 florins, because the annual rent of the farm was 150 florins: *Quod erat simplum, et contractus locationis est certus, id est certæ quantitatis; tales autem duplum egredi non possunt: quæ regula*, exclaims Huberus, *incredibile est quam vulgo ignota visa est!*¹

In illustration of the second rule, he states this case: Hypolytus ab Arssen had purchased certain turf pits, with an agreement that the seller should give him the right of way through a certain ditch, requisite to remove his turf. After the sale, however, the purchaser found that the seller had intentionally (*per dolum*) left a strip of earth between him and the ditch, so that he could not use it. The plaintiff proved that at the time of the obstruction he could daily make forty florins; but that, afterwards, prices had fallen to twenty florins, at which he had been obliged to sell his turf. *Condemnatus est venditor in id quod emptoris interesset. Cum ad taxationem ejus quod interest preventum esset*, the plaintiff claimed this sum, namely, the price at forty florins, which greatly exceeded twice the purchase-money of the whole land. But for the defense it was contended, 1. That the alleged price of turf was extraordinary. 2. The injury was not sufficiently direct, for the plaintiff might have gone round through the land of other parties, or he could have thrown a bridge over the obstacle, and thus

¹ Huber. Prael. Jur. i, 405, § 17.

¹ Vol. iii, p. 88.

transported his turf. 3. That the buyer had an offer of thirty-two florins, which he had refused ; and that, consequently, the seller was not liable unless, perhaps, for the expense of the bridge that the buyer might have made, and the transportation of the turf over it. Huberus thus answers these arguments : 1. The price was the common one, and, at all events, the objection was inadmissible in a case like this of fraud. *Præterea per dolum hic prætextus excludebatur.* 2. The objection came too late, because the seller was already condemned to respond in damages. As to the bridge, it was not to be required that this idea should have suggested itself to the buyer, nor was he bound to resort to such an expedient in case of fraud. 3. The buyer was not bound to receive thirty-two florins for his turf at a time when he could sell them for forty. But the cause was decided on the basis of the offer of thirty-two florins ; and Huberus seems to deplore the arbitrary control exercised by the courts over the subject of compensation. *Quanquam juris igitur rationes, pro triumphante (the plaintiff) militaire videntur, tamen ut est hujus rei praxis valde lubrica et tantum non arbitraria, factum est ut venditor vix ultra quam obtulerat sit condemnatus.*¹ It might be curious, if our space permitted, to compare the decision here made with what it would be in a similar case—say, a conveyance with a covenant of right of way—according to our jurisprudence.

Among the more recent writers on the modern civil law, we find the same absence of any definite rule, of which I have already complained. Domat says,² the seller who fails to deliver must pay the damages caused

¹ Huberus, Prael. Juris., vol. iii, pp. 88, 89, §§ 30 to 35.

² Contrat de Vente, Loix Civiles, liv. 1, tit. 2, sec. 2, § 27. Troplong, in his masterly treatise *De la Vente*, com-

plains of the looseness of Domat on the subject of the measure of damages; but the difficulty appears to be rather in the system than in the author.

by his default, according to the circumstances of the case. Thus, he who contracts to deliver any article of merchandise, the price of which rises at the time and place fixed for delivery, must pay the actual value at such time and place, as well on account of the profit that the purchaser would have made by reselling them there, as on account of the loss that he sustains by being obliged to purchase other articles at a price exceeding that of his bargain. So, he says that the purchaser would be entitled to his expenses actually incurred on coming to receive the article which was to have been delivered, but that remote and unforeseen consequences are not to be taken into consideration. Thus, for instance, if the seller failing to deliver the commodity at the time and place fixed on, the purchaser has been made unable to transport them to another place, where he could sell them at an advance ; or if, by reason of the non-delivery of the article, he has been obliged to send off his workmen, and to stop some work of which the cessation causes him considerable injury, the seller will be considered liable, neither for the profit lost nor the injury sustained ; for these consequences are not to be imputed to the default of delivery, but result from the arrangements of a higher power, and accidental circumstances which no one can control.¹ **

¹ *Cont. de Vente*, liv. i, tit. 2, sec. 2, § 18.

CHAPTER XXVI.

THE MEASURE OF DAMAGES IN ACTIONS UPON CONTRACTS OF INDEMNITY.

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| <p>§ 784. Contract of principal and surety.</p> <p>785. Implied contract of indemnity.</p> <p>786. Express contract of indemnity.</p> <p>787. Interpretation of the contract.</p> <p>788. Measure of damages on contracts of indemnity.</p> <p>789. Contracts to pay or discharge a debt.</p> <p>790. The rule not to be approved on principle.</p> <p>791. Contracts to indemnify or save harmless.</p> <p>792. Early cases erroneous.</p> <p>793. Later cases follow the true rule.</p> <p>794. Actual loss always recoverable.</p> <p>795. Contracts to save from liability, etc.</p> | <p>§ 796. Payment.</p> <p>797. Payment by note.</p> <p>798. Note must be accepted as payment.</p> <p>799. Payment by bond or non-negotiable note.</p> <p>800. Payment in land or goods.</p> <p>801. Compensation for actual loss only.</p> <p>802. Judgment against surety often conclusive on principal.</p> <p>803. Litigation expenses.</p> <p>804. None where suit was unnecessary.</p> <p>805. Notice of suit.</p> <p>806. Consequential loss.</p> <p>807. Co-sureties.</p> <p>808. Costs between co-sureties.</p> |
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§ 784. Contract of principal and surety.—* The contract of suretyship is one of very frequent occurrence, arising in some cases by implication of law, as between the parties to negotiable paper, or debtors and their bail; in others it is created by express agreements of guarantee. These, again, sometimes take the form of indemnities and contracts to save harmless, and at others assume the more binding shape of express contracts to do the particular thing in question; in which last case, indeed, the peculiar relation of principal and surety often ceases to exist.¹

¹ "In ancient times," said Buller, J., in *Toussaint v. Martinnant*, 2 T. R. 100, "no action could be maintained *at law*, where a surety had paid the debt of his principal. Now, why does the law

raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise."

The questions that ordinarily present themselves, as between the principal debtor and the party who has assumed for him the obligations of a surety, relate to the circumstances which entitle the latter to call for repayment of any sum he may have been obliged to pay for him; the mode of that payment; and the collateral expenses, legal or otherwise, of which he can demand reimbursement. These questions sometimes arise in actions by sureties against their principals, sometimes in suits against the sureties themselves; and though the law generally tends to favor the surety, still, so far as the construction of the contract is concerned, no difference is made as to the manner in which the case is presented.

There is another class of cases of a mixed character, where actions are brought against sureties for sheriffs, constables, or other public officers. As these cases involve the consideration of the principles of the measure of damages in actions on official bonds, we have already treated them in the chapter on that subject. It is only necessary, therefore, here to consider the liabilities of principal and surety as arising out of private contract.

Let us first bear in mind the clear distinction that exists between two classes of cases, falling under the general head. "It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the non-performance of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences are essentially different."¹ **

§ 785. Implied contract of indemnity.—* A surety for the payment of money cannot call on his principal until he has paid the debt.^(*) So it was early held by Lord Mansfield,

¹ *Gilbert v. Wiman*, 1 N. Y. 550, 562.

(*) *Churchill v. Moore*, 15 Kas. 255; *Hall v. Nash*, 10 Mich. 303; *Butler v.*

in regard to a surety in a bond ; “till damnified,” said his lordship, “which he could not be till he had been called upon and had paid, he could not bring an action.”¹ And so it has been held in New York, where the surety had been sued and charged in execution, that not having paid the debt, and having no promise to indemnify him, he could not recover against his principal.² For this a technical reason also exists, that the only action that can be maintained in such case is *assumpsit* for money paid, which, of course, will not lie until money or its equivalent is paid.³ There is in this case no express contract of indemnity, and no reason for the law to create a promise until the surety has actually lost property for which the principal should in equity compensate him.

§ 786. **Express contract of indemnity.**—* Where the plaintiff holds an express promise to indemnify and save him harmless, there he can maintain an action without having paid the debt ; and we shall presently examine the extent of compensation allowed for the injury he alleges himself to have sustained.⁴ But where the plaintiff holds not merely an agreement to indemnify and save him harmless against the consequences of the default of the other, but an express promise to pay a debt, or to do some particular act, then the position of the parties entirely changes. The relation of principal and surety disappears, and it has been held that the failure to perform the act agreed on gives the plaintiff a right of action

¹ *Taylor v. Mills*, Cowp. 525 ; *Paul v. Jones*, 1 T. R. 599 ; *Powell v. Smith*, 8 Johns. 249 ; *Rodman v. Hedden*, 10 Wend. 498 ; *Pigou v. French*, 1 Wash. C. C. 278.

² *Powell v. Smith*, 8 Johns. 249.

³ *Rodman v. Hedden*, 10 Wend. 498.

The bail of a deputy sheriff are not liable unless the sheriff has been damnified or made legally liable in consequence of the dereliction of the deputy. *Hughes v. Smith*, 5 Johns. 168 ; *Rowe v. Richardson*, 5 Barb. 385.

Ladue, 12 Mich. 173 ; *Thompson v. Richards*, 14 Mich. 172 ; *Kenyon v. Woodruff*, 33 Mich. 310 ; *Burt v. Dewey*, 40 N. Y. 283.

even before he has suffered any direct damage himself ; and so it has also been decided as a rule of pleading.

Where the defendant agrees to discharge the plaintiff from any bond or other particular thing, there the defendant, having agreed to do a particular act, cannot plead *non damnificatus* ; but where the condition is to discharge the plaintiff *from damage* by reason of any particular thing, or to *indemnify and save harmless*, there the damage must be shown, and consequently *non damnificatus* is a good plea.^{1**}

§ 787. Interpretation of the contract.—In all covenants of indemnity, therefore, a preliminary question of interpretation arises ; and it becomes necessary to decide whether the contract is to pay a sum of money or discharge one from a debt or liability, or whether it is merely to save harmless or to protect from damage. If the former is the case, the contract is broken, and damages are to be recovered upon the defendant's failure to pay the money or discharge the debt ; if the latter, the contract is broken only when the plaintiff suffers damage by reason of the liability covenanted against.

§ 788. Measure of damages on contracts of indemnity.—The general rules are as follows : If the defendant contracted to pay or discharge a debt, the measure of damages is the amount of the debt, although the plaintiff has not paid it,^(a) and even if he is not liable for it,^(b)

¹ Cutler v. Southern, 1 Saund. 116, aff'd in Error, Id. 479 ; Thomas v. Hill, note 1 ; Holmes v. Rhodes, 1 B. & P. 145. These two last cases 638 ; Hodgson v. Bell, 7 T. R. 97 ; overrule that of Douglass v. Clarke, 14 Port v. Jackson, 17 Johns. 239 ; s. c. Johns. 177.

(a) Gage v. Lewis, 68 Ill. 604 ; Smith v. Rogers, 14 Ind. 224, 227 (*semble*) ; Ham v. Hill, 29 Mo. 275 ; Seligman v. Dudley, 14 Hun 186 ; Fletcher v. Derrickson, 3 Bosw. 181 ; Porter v. State, 23 Oh. St. 320, and all the cases cited in the next section.

(b) Hodgson v. Wood, 2 H. & C. 649.

and without reference to the consideration he has received.^(*) If the defendant contracted to save the defendant harmless from a *liability*, it has been held that the amount of the liability is the measure of damages, though the plaintiff has not paid it.^(b) But if the contract was merely to indemnify or save the plaintiff harmless from a debt, the measure of damages is the amount the plaintiff has already paid on the debt.^(c)

§ 789. **Contracts to pay or discharge a debt.**—Upon breach of a contract to pay or to discharge another's debt, an action lies at once, upon default, to recover the amount of the debt, without proof by the plaintiff that he has paid it.^(d) So where one of a firm, having, on its dissolution, undertaken to collect its outstanding claims, gave his bond to pay all demands against it, and save the other partner and his sureties and indorsers, on account of said firm, harmless, it was held that the obligee could recover on the bond the amount of the partnership debts existing due and unpaid.^(e) In *Gage v. Lewis*,^(f) a case

(*) *Cooper v. Page*, 24 Me. 73; *Oakley v. Boorman*, 21 Wend. 588.

(b) Cases cited in § 795.

(c) Cases cited in § 793.

(d) *Carr v. Roberts*, 5 B. & A. 78; *Lathrop v. Atwood*, 21 Conn. 117; *Pierce v. Plumb*, 74 Ill. 326; *Stout v. Folger*, 34 Ia. 71; *Dorsey v. Dashiell*, 1 Md. 198; *Farnsworth v. Boardman*, 131 Mass. 115; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Belloni v. Freeborn*, 63 N. Y. 383; *Dayton v. Gunnison*, 9 Pa. St. 347; *Raymond v. Cooper*, 8 Up. Can. C. P. 388. But *contra* (that nominal damages only can be recovered unless the plaintiff has paid the debt), *Israel v. Reynolds*, 11 Ill. 218; *Dye v. Mann*, 10 Mich. 291.

(e) *Miller v. Kingsbury*, 128 Ill. 45; *Devol v. McIntosh*, 23 Ind. 529; *Lee v. Burrell*, 51 Mich. 132; *Ham v. Hill*, 29 Mo. 275; *Ley v. Miller*, 45 N. W. Rep. 174 (Neb.); *Sinsheimer v. Tobias*, 53 N. Y. Super. Ct. 508; *Wilson v. Stilwell*, 9 Oh. St. 467. See, however, *Duran v. Ayer*, 67 Me. 145, where the plaintiff recovered only what he had paid, but he did not except to the decision. The point decided was, that the plaintiff could recover, on a contract to pay the debts of a third party and to hold the plaintiff harmless,

(f) 68 Ill. 604, 617.

of this nature, Scholfield, J., said : " It has ever been held that where a bond is given, intended as a bond of indemnity, but containing a covenant that the obligor will pay certain debts, for the payment of which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damnified, unless, from the whole instrument, it manifestly appears that its sole object was a covenant of indemnity." In a case before the Supreme Court of the United States, (*) it appeared that the defendant agreed that if the plaintiff would prosecute a claim against a third party and obtain judgment and levy on the property, he, the defendant, " would bid it off for whatever the judgment and costs might be." This he did not do, and the property was knocked down to the plaintiff for a nominal sum. Suit was then brought for the breach of the agreement, and the court held the defendant liable for the full amount of the judgment, with interest and costs. This ruling the Supreme Court affirmed, after a full consideration, notwithstanding the fact that the plaintiff would apparently by this decision be able to

the full amount of the loss sustained, not to exceed the amount of the notes and interest. See also, *Smith v. Riddell*, 87 Ill. 165. The contract in *Walker v. Broadhurst*, 8 Ex. 889, was of a slightly different nature. The plaintiff entered into partnership with A. and B., on condition that they should furnish security as to the state of the firm. The defendant covenanted with the plaintiff that the amount due the old firm should not be less than a sum specified, and that the debts of the firm should not exceed a certain sum. It appearing that the debts exceeded the amount specified, but also that less than that amount had been paid on account of the liabilities of the old firm, it was held that the defendant's covenant was a contract of indemnity only, but that the plaintiff was entitled to recover as damages the actual loss which he had sustained by reason of the defendant's breach of covenant ; and that the amount of such damage was purely a question for the jury.

(*) *Wicker v. Hoppock*, 6 Wall. 94. See argument of plaintiff in error, p. 95.

make use of the two judgments, and thus might recover more than the amount of his claim. * So in New York, where the plaintiff, as lessee for a term of years, had assigned it to the defendant, who executed a covenant to pay the rent to the head landlord, it was insisted on the part of the defendant, that the plaintiff could only recover nominal damages unless he showed that he paid the rent ; but the court said : " The covenant is express and positive that the defendant will pay the rent ; and it would be against all reason and justice to say that the plaintiff shall himself first pay and advance the money before his right of action against the defendant to recover it arises " ; and the rent was held to be the measure of damages.^{1**} The same rule has been applied by the New York Commission of Appeals to the breach by a lessee of an absolute covenant to pay taxes or assessments on the demised premises.(*) So where the defendant had agreed to pay certain notes and mortgages made by the plaintiff, to third parties, the plaintiff was allowed to recover the full amount, though unpaid.(*) And on an agreement by the purchaser of an equity of redemption that if the mortgage were foreclosed no personal judgment should be taken against the plaintiff the measure of damages is the amount of a judgment so recovered, though it has not been paid.(°)

* So again, if one, by bond, guarantees that a third party

¹ *Port v. Jackson*, 17 Johns. 239, 245 ; *Court*, 2 T. R. 640 ; *Hodgson v. Bell*, s. c. in error, Id. 479. See *Toussaint* 7 T. R. 97 ; *Atkinson v. Coatsworth*, *v. Martinnant*, 2 T. R. 100 ; *Martin v.* 8 Mod. 33.

(*) *Trinity Church v. Higgins*, 48 N. Y. 532.

(°) *Furnas v. Durgin*, 119 Mass. 500.

(°) *Banfield v. Marks*, 56 Cal. 185. Upon the analogy of these decisions the case is probably to be upheld elsewhere cited, where it was decided that in an action brought on a covenant to discharge an existing incumbrance, the plaintiff was entitled to recover the full amount of the incumbrance, though nothing had been paid. *Lethbridge v. Mytton*, 2 B. & A. 772.

shall pay a certain sum of money by a given day, on demand, the plaintiff must assign the non-payment of the money by the third party as a breach of the condition of the bond sued on, but he is not bound to give any further evidence of the extent of his damages, the instrument itself fixing the amount he is entitled to recover; and it was so held against the defendant, who insisted that, in the absence of such evidence, the plaintiff could only recover nominal damages.¹

And a similar decision was made in the English Exchequer.² The defendant was indebted to H. D. and G. B. in the sum of £400, secured by a promissory note made by the defendant, and by the plaintiff as the defendant's surety; and thereupon the defendant covenanted that he *would pay H. D. and G. B.* the sum of £400, on or before the thirteenth of August then next; breach, non-payment by the day. On the trial it appeared that the plaintiff had been notified that he would be held liable on the note; but the note was not paid, and the defendant insisted that the plaintiff was only entitled to nominal damages. The Lord Chief Baron Abinger overruled the objection; and the plaintiff had a verdict for the note and interest. On showing cause why there should not be a new trial, this was held right. Alderson, B., said: "To what extent has the plaintiff been injured by the defendant's default? Certainly to the amount of the money that the defendant ought to have paid according to his covenant";^(*) and he likened it to an action of trover for title deeds.**

¹ Mann v. Eckford, 15 Wend. 502; *In re Negus*, 7 Wend. 499. So where the defendant, having guaranteed to keep the plaintiff clear of back interest, failed to do so, it was held that the plaintiff was damnified from the moment judgment was obtained against him, and might sue on the agreement. Gardner v. Grove, 10 S. & R. 137.

In another case, however, the court told the jury they were at liberty to find for the whole amount of the plaintiff's liability, but recommended them to find only for the amount actually paid. Bauer v. Roth, 4 Rawle 83.

² Loosemore v. Radford, 9 M. & W. 657.

(*) Gunel v. Cue, 72 Ind. 34; Malott v. Goff, 96 Ind. 496.

The following case carries out this doctrine to its fullest extent: One Jennings had bequeathed to the children of his granddaughter, a Mrs. Button, on her death, a legacy of £400, to be paid at the age of twenty-one to the survivors who reached that age, and the testator devised part of his estate charged with the legacy, in moieties to his two daughters; the plaintiff, as heir at law to one of the daughters, who had then died, effected a partition of the estate with the other daughter, each covenanting with the other to pay half the legacy. The plaintiff subsequently sold his part to the defendant, subject to the payment, by the defendant, of one moiety of the legacy to W. H. Parker, the only surviving child of Mrs. Button, who was dead, on his attaining the age of twenty-one, or to his personal representatives in case of his death under age, and *the defendant covenanted with the plaintiff to pay such moiety, and indemnify the plaintiff against all liability on account of it.* Parker died under twenty-one, and his administrator claimed a moiety of the legacy, which the plaintiff, claiming it himself, notified the defendant not to pay. A bill having been filed by Parker's administrator to compel the payment of the legacy to him by the plaintiff, it was, on the ground that the legacy was no longer a charge on his estate, dismissed with costs, though the plaintiff had to pay some costs as between attorney and client. The plaintiff having brought an action on the covenant alleging as breaches the non-payment of the moiety to Parker's personal representatives and the non-indemnity of the plaintiff, whereby the plaintiff incurred costs, it was held by all the judges that the plaintiff was entitled not merely to nominal damages, but to the full indemnity, including the £200 and the costs paid by the plaintiff.^(*)

(*) *Hodgson v. Wood*, 2 H. & C. 649.

One English case seems to be opposed to the rule above stated. In that case it appeared that the plaintiffs lent the defendant £600 on the security of an indenture by which two policies on the defendant's life were charged with the loan. In the indenture the defendant covenanted to pay the premiums on the policies, which would become void unless these should be annually paid. The defendant paid the first premium only, and the plaintiffs sued him on his covenant for non-payment of three years' premiums. It was held that, as it did not appear the plaintiffs had sustained any loss, they were entitled to nominal damages only.^(*)

§ 790. The rule not to be approved on principle.—* These decisions appear somewhat to conflict with the important and fundamental rule which has already been stated, that actual compensation will not be given for merely probable loss. Nor is the argument that the party, having bound himself to do a particular act, must therefore be held liable in the full amount, of greater weight.^(b) There is a multitude of contracts of the same character, to which no such doctrine is applied. If, instead of a contract to pay a certain sum of money, the agreement be to do any other particular act, an inquiry is indispensable to ascertain how far the party plaintiff has been damnified by the nonfeasance. It is, perhaps, no great stretch of reasoning to say that the damages aris-

(*) *National A. & I. Assoc. v. Best*, 2 H. & N. 605.

(b) This and the preceding remark are disapproved by Leonard, C., in *Trinity Church v. Higgins*, 48 N. Y. 532, 538. He observed that "parties have the just right to make all lawful contracts guarding their rights and securing performance of their intentions, including that of contravening the rule of actual compensation for actual loss; and when expressed in apt and suitable language, it would be flagrant wrong if courts of justice should assume to disregard it, in favor of some technical rule framed for other and wholly different circumstances."

ing from the non-payment of money should be measured by the sum itself. Still, a doubt may often arise whether the *party who holds the agreement* has been injured to that extent ; and this is well pointed out by a very accurate judge, in *Loosemore v. Radford*.¹ Parke, B., said : " The defendant may, perhaps, have an *equity*, that the money he may pay to the plaintiff shall be applied in discharge of his debt ; but, *at law*, the plaintiff is entitled to be placed in the same situation, under this agreement, as if he had paid the money to the payees of the bill." This remark of a very acute judge states the evil, but suggests no remedy. The law is thus carried into execution unattended by the equity which should temper it. It is one of many instances illustrating the inconvenience and serious hardships that often flow from the separation of the jurisdictions. Either the plaintiff should only be allowed to recover for actual loss ; or, if the court proceed upon the idea of compelling the defendant specifically to perform his promise, it should carry the engagement into full execution, by applying the proceeds of the judgment where they belong. This a court of law possesses no power to do ; and as it is incompetent to do complete justice, it should confine its remedies exclusively to those cases where actual injury appeals for redress.**

§ 791. *Contracts to indemnify or save harmless.*—* It appears upon the whole, settled, that if the engagement be collateral, or, more properly speaking, indirect, whether only implied in law, or whether it be an undertaking to indemnify and save harmless against the consequences of the default, there damage to be recovered must be proved. And so it is held whether the action be by the surety

¹ 9 M. & W. 657.

against the principal, or by the creditor against the surety.**

§ 792. **Early cases erroneous.**—In a case at Nisi Prius, before Lord Ellenborough, on a bond conditioned to indemnify the plaintiff against a bond given by him to a third party, though it did not appear that he had paid it, his lordship said that he did not see any measure of damages except the penalty of the bond; and the jury so found.¹ * In a case in New York, this erroneous view of the subject was carried to a great length; and it is desirable carefully to notice the decision, and those by which it has been since overruled; for unless we adhere strictly to the principle that actual compensation shall only be awarded for actual loss, we are without any guide whatever in this branch of the law. Suit was brought² by the overseers of the poor against the sureties in a bond given by the father of an illegitimate child, before its birth, to save harmless and indemnify the town against all expenses by reason of the child. After the birth, an order was made by two justices, according to the statute, fixing the amount of the defendant's liability. It was insisted that this order was competent evidence against the defendant, and that the town was not bound to show the actual expenditure of the sum claimed; and it was so held by the Court of Errors. Jones, C., said:

“It was urged as the general rule applicable to contracts of indemnity, that the party who is to be indemnified cannot maintain an action on the contract against the indemnifier until he has been damnified. But that rule does not necessarily, and in all cases, require the actual payment of the damages or expenses incurred to enable the party to sue for and recover the indemnity. When the obligation is to indemnify against damages or expenses, and the obligee has become absolutely bound and liable

¹ Wood v. Wade, 2 Starkie 167.

623, 639, 647, reversing Donely v.

² Rockfeller v. Donnelly, 8 Cowen, 8 Cow. 253.

to pay the expense or damage incurred by the charge, and his demand against his obligor upon the bond of indemnity, by reason of the charge against himself, is reduced to a certainty, it would surely be just and reasonable, and would violate no principle of law, to permit him to enforce his own demand against his obligor in the first instance, and before he satisfies the charge against himself. It is an operation which avoids circuitry, and essentially subserves the purposes of justice and equity, by enabling him who is entitled to the indemnity to obtain the means to satisfy the charge he has incurred from the party who ought to bear it, and thereby save himself the necessity of an advance and payment out of his own funds and estate, which might be inconvenient, and perhaps involve him in serious embarrassments. . . .

“ If there had been no adjudication against the father, assessing the amount he should pay for the indemnification of the plaintiffs, and there had been no admission in pleading of the amount demanded, other evidence might have been necessary to enable the jury to assess the damages ; but the plaintiffs might in such case have shown that the father had, with the consent and concurrence of his sureties, agreed to pay a weekly or monthly sum for the maintenance of the child, and on the principle of the case of *Hays v. Bryant*,¹ have recovered that sum for their indemnity against the charge ; or, as I apprehend, it would have been sufficient for them to show what sum was reasonably necessary for the support of the child during the time it had been chargeable to them ; and for that sum, if the child was shown to have been provided for by their procurement, the jury would have been warranted in giving their verdict. Other cases might be put : the town, for example, may have an establishment upheld by a common fund, or supplied by the contributions of the inhabitants in money or provisions, for the maintenance and support of those who are chargeable to it, and where provision is made for illegitimate children as well as paupers, or the infant may be left with the mother by the overseers of the poor, under some arrangement with her for a reasonable allowance for its support ; or expenses may be incurred for its maintenance, which, from want of means, or from forbearance or other causes, remain unpaid. In none of these supposed cases, each one of which may

¹ 1 H. Bl. 253.

occur and is within the scope of probability, would there be an expenditure or actual payment of money ; and could it be pretended that in any one of them the overseers of the poor would be disabled, by that cause, from recovering a reasonable and just compensation for the maintenance of the child ? The measure of damages might, in some of these cases, be attended with difficulties, which might sometimes be insuperable ; but the right of the plaintiffs to compensation for the use of those who might have a claim upon them for the maintenance of the child, and thus enabling them to satisfy the charge, would be undeniable, and the difficulty of the remedy alone would obstruct it. In the present case, the overseers of the poor, to obviate all difficulties on that point, have had the precaution to obtain the further relief provided by the act, in an order of bastardy, by which the weekly contribution of the reputed father to the overseers for the support of the child is judicially and conclusively settled and determined. This adjudication was in evidence, and, in my judgment, it was conclusive upon both the father and his sureties, as the rule of damages in the action on the bond."¹

It will be observed that here the covenant was merely to indemnify and save harmless, and did not reach to the extent of a promise to do the thing in the first place. It is to be noticed, also, that the whole scope of this reasoning is opposed to the general rule that actual compensation will only be given for actual loss, and cannot be supported but on the idea that a court of law is to assume the powers of a court of equity, and compel an imperfect kind of specific performance. If this doctrine were maintained, covenantors against incumbrances would be compelled to pay before the incumbrance was discharged ; covenantors for quiet enjoyment would be obliged to pay before eviction ; and all parties agreeing to do a specific

¹ The same point was again decided in the *People v. Corbett*, 8 Wend. 520. But in *Churchill v. Hunt*, 3 Denio 321, these decisions are said to rest entirely on the spirit and intent of the statute. "giving these bonds an effect which

they would not have at common law"; and it is there said to be for the same reason that in a claim against the sheriff on bonds for the jail liberties, it is unnecessary to prove damage. *Kip v. Brigham*, 7 Johns. 168.

thing would be mulcted in the sum equivalent to performance, without any proof whatever that the other party had been injured, or that his position was such that he could be.**

§ 793. *Later cases follow the true rule.*—* But this is not the result of the more recent authorities of the courts in this country. In an early case, the question “whether on an escape the bail to the liberties became liable for the whole penalty, or for the damages sustained by the sheriff by reason of the escape?” was raised in New York, but not decided.¹ But it was soon after said that neither the sheriff nor his assignee could recover without showing injury sustained, and that, consequently, recapture after the escape, or voluntary return, was an answer to a suit against the sureties for the liberties.^{***} In another case, on an agreement to indemnify and save harmless against a certain demand, a judgment having been recovered on the claim in question against the plaintiff, but nothing having been paid thereon, the case of *Rockfeller v. Donnelly* was pronounced “a very questionable” one; and judgment was given for the defendant, the court saying: “This is not an agreement to indemnify against liability, but it is the common case of an agreement to indemnify against the claim or demand of a third person; and before the plaintiff can recover, he must show that he has been damnified; the mere fact that the demand has changed its form by having passed into a judgment is not enough.”[†] Again, on a bond “to save harmless,” it was said, “Here is no absolute agreement to pay, and no agreement to keep the party clear from liability, but merely to indemnify”; and it was held, that, in order to recover, damage, and that involuntarily sustained,

¹ *Jansen v. Hilton*, 10 Johns. 549.

[†] *Barry v. Mandell*, 10 Johns. 563.

^{*} *Aberdeen v. Blackmar*, 6 Hill 324

must be shown. It was intimated, however, that "perhaps after a suit commenced, and notice given to the obligor, and neglect by him to defend, the obligee would be warranted in putting a stop to the costs."¹ In a later case in New York, the whole subject was considered in the Court of Appeals. The covenant was, that the plaintiff should not sustain any damage or molestation by reason of any liability incurred by his deputy. Judgment had been recovered against the plaintiff, but not paid; and it was held that he was not entitled to recover.²

In *Valentine v. Wheeler*,^(*) where the contract (condition of bond) was to pay all demands, acceptances for which the plaintiff should be in any way responsible on account of the obligee, and to hold the plaintiff harmless and free from loss or inconvenience on account of any debts and claims of the obligee, the court construed this to be merely a contract of indemnity, and allowed the plaintiff to recover only what he had actually paid.^(b) So in an action on a promissory note or other instrument given as an indemnity by a principal to his surety the measure of damages is the amount paid by the surety at any time before trial, and unless he has made an actual payment he can recover nominal damages only.^(c) So in *Truckie Lodge v. Wood*,^(d) where the defendant had put up a building for the plaintiff and had allowed liens to attach contrary to his agreements that it should not be "accountable" for any of the materials of construction,

¹ *Crippen v. Thompson*, 6 Barb. 532, acc. *Jeffers v. Johnson*, 21 N. J. L. 536. In Ohio, see *Ohio Life Ins. and*

² *Gilbert v. Wiman*, 1 N. Y. 550; *Trust Co. v. Reeder*, 18 Ohio 35.

(*) 122 Mass. 566.

(b) Acc. *Martindale v. Brock*, 41 Md. 571; *Kraft v. Fancher*, 44 Md. 204.

(c) *Cushing v. Gore*, 15 Mass. 69; *Little v. Little*, 13 Pick. 426; *Osgood v. Osgood*, 39 N. H. 209; *Child v. Eureka Powder Works*, 44 N. H. 354.

(d) 14 Nev. 293.

it was held that evidence of their amount was properly excluded, as the plaintiff had not paid them, although they were then in process of foreclosure. And later American decisions establish the rule that if the contract is one of indemnity merely, there can be no recovery without actual loss. (*)

* These decisions replace this branch of the law on its proper basis, and declare the salutary principle, that actual compensation can only be given for positive loss unless it is evident that the parties have stipulated for a more extensive remuneration. **

§ 794. **Actual loss always recoverable.**—But the actual loss is always recoverable upon a contract of indemnity. So where the defendant guaranteed the payment of a note which provided for interest after maturity at the rate of 20 per cent. per annum, he must pay interest at that rate. (b) Upon a contract of indemnity given to a mortgagee upon selling timber from the mortgaged land, the measure of damages is the amount the land was depreciated in value by the removal of the timber. Where the land itself was not injured, and the sale was a fair one, the measure of damages is the amount realized from the sale. (c)

§ 795. **Contracts to save from liability, etc.**—* Liability is a very different thing from damage; and the literal object of the covenant is not attained unless the plaintiff may rest on showing mere proof of *liability*, and is relieved from the obligation of proving *damage*. The only way to relieve the plaintiff from being liable to be made

(*) Baetjer v. Bors, 7 Ben. 280; Lott v. Mitchell, 32 Cal. 23; Redfield v. Haight, 27 Conn. 31; Hussey v. Collins, 30 Me. 190; Gillespie v. Creswell, 12 G. & J. 36; Conner v. Bean, 43 N. H. 202; Scott v. Tyler, 14 Barb. 202; Selover v. Harpending, 54 N. Y. Super. Ct. 251.

(b) Gridley v. Capen, 72 Ill. 11.

(c) Curtis v. Baugh, 79 Ill. 242.

to pay the debt, is for the law to see to its extinguishment.¹*** Thus, on a bond "to save harmless and indemnify against all damages, costs and charges to which the plaintiff's intestate might be subjected, or *become liable for*," it was said by the Supreme Court of New York:

"There is no doubt as to the general proposition that, in order to recover upon a *mere bond of indemnity*, actual damage must be shown; if the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment, or that which the law considers equivalent to actual payment; but if the indemnity be not only against actual damage or expense, but also against *any liability* for damages or expenses, then the party need not wait until he has actually paid such damages, but his right of action is complete when he becomes legally liable for them."

And on the ground that the bond before the court was against *liability*, the plaintiff was allowed to recover.²(*) In the case of *Spark v. Heslop*,^(b) the defendant, in a letter to the plaintiff requesting him to pay to a banking company for his account a bill of exchange for £400, drawn by one Henderson on and accepted by one Hutchinson, and indorsed by the defendant, and also requesting him to bring an action against Hutchinson for the recovery of the amount and interest, added the following engagement:

"And I hereby agree to be answerable to you for the due payment of the amount of the said bill and interest which you may pay to the said banking company, and for all

¹ See, in Virginia, a suit by a sheriff to a mill-dam. *Chapman v. Ross*, 12 Leigh 565.
² *Chace v. Hinman*, 8 Wend. 452, 456; *In re Negus*, 7 Wend. 499; and *Webb v. Pond*, 19 Wend. 423.

(*) So in *McGee v. Roen*, 4 Abb. Pr. 8; *Martin v. Bolenbaugh*, 42 Oh. St. 508.

(b) 1 E. & E. 563.

costs, damages, and expenses which you may *sustain* by reason of such payment and the trying of the said action against the said John Hutchinson, and in any manner relating or incidental thereto, you giving me credit for all money you may receive from the said John Hutchinson in such action."

The plaintiff having brought the action against Hutchinson unsuccessfully, the court distinguished this undertaking from the case of an indemnity, and between "sustaining" costs, damages, and expenses, and paying them. They held that the plaintiff sustained damage when the liability was incurred, and that he could recover the costs he was liable for to his own attorney, although he had not paid them, as well as those of the defendant in the other suit which he had paid. Accordingly, the plaintiff has recovered the whole amount of a judgment obtained against him, though he has paid nothing on it, when the defendant agreed to indemnify him against liability,^(a) against actions, suits, or claims,^(b) judgments,^(c) debt,^(d) or trouble.^(e) And where the defendant gave the plaintiff a bond to pay all taxable costs which the plaintiff should "incur and become bound to pay" in a certain suit, it was held that the plaintiff could recover the amount of costs for which judgment had been rendered against him, though he had not paid the judgment.^(f)

In an early New York case, where a bond was given "to save harmless and indemnify the plaintiffs *against their liability* as makers of a certain note, and *to pay or cause to be paid* the said note," it was held that the plaintiffs,

^(a) Kirksey v. Friend, 48 Ala. 276; Jones v. Childs, 8 Nev. 121.

^(b) Warwick v. Richardson, 10 M. & W. 284; Cook v. Merrifield, 139 Mass. 139; Conkey v. Hopkins, 17 Johns. 113.

^(c) Conner v. Reeves, 103 N. Y. 527; Martin v. Bolenbaugh, 42 Oh. St. 508.

^(d) Carman v. Noble, 9 Pa. St. 366.

^(e) Fish v. Dana, 10 Mass. 46.

^(f) Jarvis v. Sewall, 40 Barb. 449.

though they had not paid the note, and were insolvent, were entitled to recover its amount, under the absolute terms of the covenant; but that the plaintiffs could not recover the costs of a suit against them on the note. As to these costs the bond was declared to be purely an agreement to indemnify; and the learned judge (Beardsley) proceeded to say: "Notwithstanding what is said in the case of *Chace v. Hinman*, I must say that I am not aware of any distinction at common law between an indemnity against damage and one against liability, which warrants a recovery on the latter on simply showing the fact of liability. In both, as I think, there must be evidence of actual damage, by the payment of money or otherwise."¹ But the rule laid down here seems to be overruled by the later decisions.

§ 796. *Payment.*—As we have seen, * the general rule is that the surety cannot proceed against his principal debtor until he has paid the debt; it still remains to be seen what in judgment of law is considered as payment. The suit of the surety against the principal is at common law an action of *assumpsit*, sometimes special, but frequently on the common counts for money paid for the defendant's use; and we now proceed to determine what proofs will satisfy the allegation of payment.²

¹ *Churchill v. Hunt*, 3 Denio 321.

² "It is an equitable principle of very general application," says Mr. Chancellor Walworth, in *Hunt v. Amidon*, 4 Hill 345, 348, "that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part

of the jurisdiction of the Court of Chancery, and substituted the equitable remedy of an action of *assumpsit* on the common money counts for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of *assumpsit* as for money paid, laid out, and expended for his use and benefit."

It will be perceived at once that this inquiry involves various questions, some of a technical character, and springing from the form of the action, others relating to the substantial rights of the parties. Is the payment of *money* in all cases necessary? Can the surety, by giving his bond or note in payment of the original debt, raise a claim against the principal? Will the transfer of land, whether by mortgage or deed, be treated as payment? and if so, at what value shall it be computed? These, and similar inquiries, are often complicated and perplexing.

The rule appears to be well settled in this country, though far from being clear in England, that the giving by the surety of his negotiable promissory note, which is received not collaterally, but as actual payment of the original debt, will be held to be payment as against the principal debtor, and that the surety may at once proceed against him for the amount of his note; in other words, the note is treated as money. While on the other hand, it is also held that the giving a bond will not have the like effect, and that, until the payment of the bond, the surety has no claim against his principal.

It is also well settled, that an absolute conveyance of the land by the surety will be sufficient to raise a claim on his behalf against the principal to its full value, and that it will be treated as money paid for the use of the original debtor. An examination of the decisions will best elucidate these rules.

In an early case in the King's Bench,¹ an application was made to discharge the defendant from custody on filing common bail; and it appeared that the defendant being indebted to one Creswell, the plaintiff Taylor had given Creswell a *bond* and warrant of attorney, and

¹ Taylor v. Higgins, 3 East 169.

paid him £7 or £8 of costs; that this security was accepted as payment and satisfaction of the debt; and it was contended that this was the same as if the debt had been paid in money. But Lord Ellenborough said: "There is no pretense for considering the giving this new security as so much *money paid* for the defendant's use"; and the rule to discharge the defendant from custody was made absolute.¹

On the authority of this case the same point has been decided in New York.² The plaintiffs being accommodation indorsers for the defendant, had, on being sued, executed to the holders of the accommodation paper, on the 15th April, 1807, two bonds, one payable in eighteen months and the other in two years, which bonds had not been paid. The plaintiffs, subsequently, were discharged under the insolvent act. The judge charged that the two bonds amounted in law to the payment of the notes, but the jury found a verdict for the defendants. On the motion for a new trial, the court said:

"The question is whether giving a bond, in discharge of the liability of the plaintiffs, is to be considered as a payment of money. . . . An obligation to pay is not the same thing as the actual payment. A bond has no analogy to cash. . . . The technical rule operates with perfect justice in this case; for the bond has not, and never will be paid, as the plaintiffs have since been discharged under the insolvent act; and if the money now demanded was to be recovered, their estate would receive it without ever having given an equivalent."

The motion for a new trial was denied.

The rule laid down in this case appears to be the same where a mortgage is given. So where an accommodation indorser gave a mortgage to secure his debt,

¹ No attention appears to have been paid to the payment of the costs. This case was sustained in *Maxwell v. Jameson*, 2 B. & Ald. 51, noticed more fully hereafter.

² *Cumming v. Hackley*, 8 Johns. 202.

and subsequently released the equity of redemption, and made a conveyance of the land, the case of *Cumming v. Hackley* was cited with approbation; and it was held that though the conveyance gave a right of action, the mortgage furnished no basis of claim.¹ **

§ 797. *Payment by note.*—* A different rule has been adopted, where the payment, if such it can be called, is made by giving a note. Where the plaintiff became security for the defendant's subscription to a brewers' benefit club, the club called on the plaintiff, and he gave his note for the amount of the subscription.² On the trial of the cause, it being an action of assumpsit for money paid, and the objection being taken that the giving a note was no payment, Lord Kenyon held: "That the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; and so the action was maintainable." It is added, that at the next term a new trial was moved for; but the court agreeing with his lordship, the rule was refused.

This authority was much shaken by a subsequent case.³ It was an action for contribution. The plaintiffs and defendants united in a promissory note to Batson & Co.; Maxwell took up the note, by giving his own bond to Batson & Co. for the amount. No money was paid. On this state of facts, Maxwell sued Jameson in *assumpsit for money paid*. Bayley, J., said:

"The plaintiff in this case has paid no money. It is said, indeed, that he has given what was equivalent to it, and that it

¹ *Ainslie v. Wilson*, 7 Cow. 662.

² *Barclay v. Gooch*, 2 Esp. 571. This case was referred to by the court, in *Taylor v. Higgins*, 3 East 169; but Lord Ellenborough did not commit himself to the correctness of the decision. "*Supposing, even,*" he says,

"the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still," etc.

³ *Maxwell v. Jameson*, 2 B. & Ald. 51.

ought to be considered, for this purpose, as money ; and so it was held in *Barclay et al. v. Gooch*. But in *Taylor v. Higgins*, the court, having the former case before them, held that the action for money could not be maintained. . . . Then, as the authorities differ, it becomes necessary to look to the reason of the thing. *No money has yet come out of the plaintiff's pocket, and non constat that any will ;* for if he recovers from the defendant in the present action, still it is possible that he may never pay it over to Batson & Co. The period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for his contribution."

Abbott, J., said :

"Even supposing that the plaintiff has, in this case, entirely relieved the defendant from the demand which Batson & Co. had against him (which may be doubtful), still he will then have done no more than was done by the plaintiff in the case of *Taylor v. Higgins*."

Holroyd, J., said :

"In order to support this action, the debt must have been extinguished, either by an actual or a virtual payment of money by the plaintiff to the defendant's use. There has clearly been no actual payment ; and in order to have made the giving of the bond operate as a virtual payment, the defendant must be shown to have been a party to that transaction, which was not the case." **

These cases leave the rule in England in a very unsettled state. (*)

* In this country, however, the original decision of *Barclay v. Gooch* has been followed, both in New York and Massachusetts. In a case already cited,¹ the case of *Barclay v. Gooch* was referred to by the Supreme Court of New York, with a qualified approbation. "There are

¹ *Cumming v. Hackley*, 8 Johns. 202.

(*) In *McVicar v. Royce*, 17 Up. Can. Q. B. 529, it was attempted to reconcile these cases upon the ground that in the two latter it did not appear that the obligation of the surety was taken in payment.

some cases," they say, "in which the giving negotiable paper has been held equivalent to the payment of money ; and there may be some reason for this distinction (*i. e.*, between bonds and notes), for otherwise a party may be obliged to pay a debt twice, if the paper should pass into the hands of an innocent indorsee."

The precise point came up subsequently for adjudication in an action of assumpsit for money paid.¹ The plaintiff became surety for the defendants in a promissory note to one Vanderlyn, on which judgment was recovered. The plaintiff thereupon gave his negotiable note for the amount of the judgment. This had been accepted by Vanderlyn in full satisfaction, but it remained unpaid. The judge having charged in favor of the plaintiff's right to recover, and a verdict being obtained, a motion was made for a new trial. But the court, after approving the decision in *Cumming v. Hackley*, as to a bond, said :

"There are cases in which negotiable paper has been held equivalent to the payment of money, to which it is in some measure analogous, as when the note has been negotiated, and is in the hands of an innocent indorsee. He, of course, would be protected ; and unless it was considered as a payment of the original debt, the drawer might be made to pay twice. So when the note has been accepted and paid in satisfaction of the debt. The note in this case has not been negotiated ; but has been accepted and received by the party in whose favor the judgment was obtained, in satisfaction of the debt, which is sufficient to authorize this recovery. . . . The defendant has received the full benefit, the debt has been satisfied ; and as to him, it is the same as if so much money had been paid for him."²

In another case³ which came up on error from the New York Common Pleas, Hedden, the plaintiff below, by way of accommodation for Rodman, indorsed a note on the

¹ *Witherby v. Mann*, 11 Johns. 518.

² *Rodman v. Hedden*, 10 Wend.

³ See also *Beardsley v. Root*, 11 Johns. 464.

30th of August, 1819, for \$118, payable in sixty days. In July, 1820, a judgment was obtained against Hedden, as indorser, by one Jacot ; in October, 1820, Hedden paid \$20 on account of this judgment ; on the 26th of May, 1821, \$100 more, and gave his note for \$28.10, which was accepted by Jacot in full payment and satisfaction of the judgment. The note for \$28.10 was paid by Hedden on the 28th of July, 1821, previous to which (on the 25th of July, 1821), Rodman had left the State of New York, and did not return till 1830, when the suit was brought. The note for \$28.10 was thus given and accepted in satisfaction *before* the defendant, Rodman, left the State, but not paid till *after* his departure. The defendant set up the statute of limitations, insisting that the plaintiff's cause of action accrued when the original notes made by Rodman with Hedden's indorsement came to maturity, and that, as the defendant was then in the State, the statute had attached, and the claim was consequently barred. This defense was unsuccessful in the Common Pleas, and the plaintiff had a verdict and judgment ; to reverse which, error was brought. After argument, it was said :

" If the giving the note for \$28.10, under the circumstances of the case, can be considered so much money paid by Hedden for Rodman, then the whole cause of action was complete on the 26th of May, 1821, when the note was given, which was two months before Rodman left the State. The statute having, in that event, commenced running before Rodman's departure, as to the whole cause of action, and more than six years having elapsed before the commencement of this suit, the whole cause of action is barred by the statute."

And after citing the cases we have already considered :

" We understand from the testimony, that the note was not only given by Hedden, but was also actually received in full satisfaction and discharge of the judgment. It was, therefore, upon the authority of the preceding cases, equivalent to money paid for the use of Rodman from the moment of its delivery ; and

this having been two months before Rodman left the State, the whole of the plaintiff's cause of action was then complete ; and the judge should have charged the jury that, upon the issue of the statute of limitations, the defendant was entitled to their verdict."

And the judgment was reversed.¹ So where agreements had been given by the defendants as principals, to pay or save harmless, and the plaintiffs as sureties, after verdict, had given their negotiable note for the debts and costs, it was held that the verdict was evidence against the principals, though without notice, and that the negotiable note was given and accepted in full satisfaction and discharge, was equivalent to the payment of cash ; the court adding : " So it would now probably be holden of a note not negotiable."²

The rule appears to be the same in Massachusetts. Where a promissory note was made at the request of the defendant by a third party, payable to the plaintiff, and indorsed by him, and discounted at a bank for the use and benefit of the defendant, the plaintiff paid the note to the bank by giving a new note made by himself and indorsed by another party. The English and New York cases were reviewed, and it was held that the giving the new note was equivalent to a payment of the first, and would support an action for money paid.³

So again it has been held there,⁴ that a surety who gives his own note for the debt of the principal, which is accepted as full payment by the creditor, and the principal

¹ This is a hard case, and evinces a determination to carry the rule to its greatest extent. And it is to be noticed that the judgment was reversed on a ground that by the report does not appear to have been taken at all at the trial. The defendant there insisted that the plaintiff's cause of action accrued when the original notes set forth in the declaration came to maturity—*i. e.*, Nov., 1819, and April, 1820. The

court, however, disregarding this line of defense, decided that the cause of action accrued on the acceptance of the note by Jacot—*i. e.*, 28th of May, 1821— which point does not appear to have been raised below.

² *Lee v. Clark*, 1 Hill 56.

³ *Cornwall v. Gould*, 4 Pick. 444.

⁴ *Doolittle v. Dwight*, 2 Met. 561 ; *Drake v. Mitchell*, 3 East 251.

discharged, may treat the note as money paid, and maintain an action of *assumpsit* thereon.**

The rule thus established is almost universally followed in this country,¹ and it is held that where a surety pays the debt of his principal with his own nego-

¹ It is proper to notice that the American rule, as applicable to negotiable paper—*i. e.*, that when given by a surety or secondary debtor, and accepted by the creditor in full satisfaction of his demand, it gives at once a right of action against the principal debtor—is also the rule of the civil law.

La caution, says Pothier, in his *Traité des Obligations*, part ii, ch. 6, section 7, art. 1, §§ 1 & 2, ed. of 1781, vol. 1, 212, a recours contre le débiteur principal après qu'elle a payé.—Il y a même des cas auxquels la caution a action contre le débiteur principal, même avant qu'elle ait payé; and again, Il n'importe que le paiement ait été une paiement réel, ou une compensation, ou une novation. This term, *novation*, is defined by Crivelli: de *novatio*, convention nouvelle. On appelle de ce nom, en termes de droit, le changement d'un contrat en une autre, et par lequel il est derogué au premier. Dictionnaire du Droit Civil, *in voc.* All the cases which we have just examined in the text, where bonds or notes were given to extinguish prior obligations, would, according to the civil or French law, be novations. En tous ces cas, continues Pothier, la caution a droit de demander que le débiteur principal la rembourse, soit de la somme qu'elle a payée, soit de celle qu'elle a compensée, soit de celle qu'elle s'est obligée de payer pour éteindre l'obligation du principal débiteur.

The French Code also recognizes the right of the security to proceed against the debtor before payment, and carefully defines the cases in which it is to be exercised. The provisions are as follows:

Art. 2028. La caution qui a payé a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu débiteur. Art. 2032. La caution même avant d'avoir payé put agir contre le débiteur pour être par lui indemnisée.

1. Lorsqu'elle est poursuivie en justice pour le paiement.

2. Lorsque le débiteur a fait faillite, ou est en déconfiture.

3. Lorsque le débiteur s'est obligé de lui rapporter sa décharge dans un certain temps.

4. Lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle avait été contractée.

5. Au bout de dix années, lorsque l'obligation principale n'a point de terme fixe d'échéance, à moins que l'obligation principale, telle qu'une tutelle, ne soit de nature à pouvoir être éteinte avant un temps déterminé.

It is to be borne in mind, however, that the courts of France follow the course of the civil law, and that there is no division of jurisdictions.

The enumeration of *cautions* under the French Code is not confined to the mere money paid. 2028. La caution a aussi recours pour les dommages et intérêts, s'il a lieu.

L'engagement des débiteurs envers leurs cautions n'est pas compris, says Toullier, sous la règle (1153): car ce n'est pas de l'argent que les débiteurs doivent à leurs cautions: ils doivent les indemniser des dommages qu'elles pourront souffrir de la part du créancier qui n'est pas payé, comme s'il fait saisir leurs biens. Ainsi, l'indemnité que le débiteur doit à sa caution l'oblige, sans qu'il soit besoin de stipulation aux dommages et intérêts qui resulteraient de la saisie et vente des biens de la caution. Toullier, vol. 6, 280, *des Contrats*.

This would not be so with us, as has already been said, unless the surety held a contract to indemnify and save him harmless. In the case of a suretyship arising by implication, or without a contract to indemnify, the recovery is limited strictly to the money paid for the use of the principal.

tiable note, *which is received in satisfaction of the debt*, he may sue at once and recover the amount of his note of the principal,^(a) or contribution from a co-surety.^(b)

§ 798. Note must be accepted as payment.—* It is to be borne in mind, however, in all these cases, that it is essential that the note should be given and accepted by the creditor as full payment and in complete satisfaction.^(c) This has been repeatedly decided. So where an action of covenant was brought¹ by plaintiffs, who had sold the defendants certain coal mines, for which they covenanted to pay a sum certain in instalments, the defendants pleaded payment of part, and a bill of exchange given for *payment and in satisfaction* of the residue on which judgment had been recovered. To this plea the plaintiff demurred; and it was held bad, because it was not averred that *the bill was accepted in satisfaction, nor that it had produced it*; that, not having been accepted as satisfaction for the debt, the bill could only operate as a collateral security, and that, therefore, the plaintiff might resort to his original remedy on the covenant; and, said Le Blanc, J.: "The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment." The principle of this case has been repeatedly recog-

¹ Drake v. Mitchell, 3 East 251.

(a) Bone v. Torrey, 16 Ark. 83; Mims v. McDowell, 4 Ga. 182; White v. Miller, 47 Ind. 385; Pearson v. Parker, 3 N. H. 366; Elwood v. Deifendorf, 5 Barb. 398, 410; Peters v. Barnhill, 1 Hill (S. C.) 234; *contra*, Brisendine v. Martin, 1 Ired. L. 286.

(b) Pinkston v. Taliaferro, 9 Ala. 547; Anthony v. Percifull, 8 Ark. 494; Ralston v. Wood, 15 Ill. 159; Keller v. Boatman, 49 Ind. 104; White v. Carlton, 52 Ind. 371; Robertson v. Maxcey, 6 Dana 101; *contra*, Brisendine v. Martin, 1 Ired. L. 286; Nowland v. Martin, 1 Ired. L. 307.

(c) White v. Miller, 47 Ind. 385.

nized in New York,¹ where it is held that a note is not payment of a precedent debt, unless there is an express agreement to receive it as payment.²

In another case, in New York,³ the doctrine that negotiable notes are to be considered as money, has been restricted to cases where the notes have been parted with to *bona fide* holders for value. The plaintiff, Reed, bought of the defendants a threshing-machine, and gave three negotiable notes of \$200 each for the purchase-money. The machine proving worthless, the plaintiff brought an action for *money paid* against the defendants. A verdict was obtained, but it was set aside and a new trial granted, the court, by Savage, C. J., saying :

" Had the notes in question been given to a third person in payment and discharge of a debt due by the defendants to such third person, then the case would have come within previous decisions. But I cannot find that the giving a note ever has been considered, as between maker and payee, the payment of money by the former to the latter. In my judgment, the mere giving a note cannot be considered payment of the very money for which such note is given as security, so as to justify a recovery of it by the maker against the payee."

In a more recent action, in the same State, where the facts hypothetically put by the court in the case last cited, were actually presented, the notes having been

¹ *Wetherby v. Mann*, 11 Johns. 518; *Tobey v. Barber*, 5 Johns. 68; *Johnson v. Weed*, 9 Johns. 310.

² In Massachusetts it would seem that, in some cases, this express agreement is inferred from the mere fact of giving a negotiable note.

The giving a negotiable note for a debt in a single contract raises a legal presumption that the note was received in payment, and will operate as a discharge of the single contract, unless the presumption be controlled by evidence of a contrary intent. *Thacher v. Dinsmore*, 5 Mass. 299; *Maneely v. M'Gee*, 6 Mass. 143; *Huse v. Alexander*, 2 Met. 157. So, also, in that State it is

held, in an action by the indorsee against the maker of a negotiable note, indorsed when overdue, that a negotiable note made to the defendant by the payee, intended as a payment of the note, may be shown in defense as a set-off. *Holland v. Makepeace*, 8 Mass. 418; *Sargent v. Southgate*, 5 Pick. 312. "A negotiable promissory note, by the common law of this State, is holden to be a discharge of a simple contract on which it is founded." *Emerson v. Prov. H. M. Co.*, 12 Mass. 237.

³ *Van Ostrand v. Reed*, 1 Wend. 424, 430.

transferred to a *bona fide* holder for value, the plaintiff was held entitled to recover as for money paid and received.^{1**}

§ 799. **Payment by bond or non-negotiable note.**—It is held in some jurisdictions that payment by any obligation of the surety other than a negotiable promissory note, though accepted in satisfaction of the debt, will not give an immediate right of action to the surety; (*) and the attempt is made to reconcile the English cases upon this distinction. Most of the cases recognize no such distinction; and in some cases it is expressly denied.^(b) There seems no foundation for it, and it indeed appears to have arisen from the form of action brought by the surety. The action was usually brought on a count for money paid, and the courts making the distinction were averse to allowing that count to lie when neither money nor a negotiable note had been given. It is needless to say that a distinction founded entirely upon the form of action should not be supported at the present time. The cases allowing an action where payment has been made by the property of the surety, now to be considered, seem opposed to it.

§ 800. **Payment in land or goods.**—* It remains to be seen how far the conveyance or transfer of land or other property in discharge of a pecuniary liability furnishes the surety an action against his principal.

In an action of assumpsit for money paid,¹ the defendant, on the 12th of April, 1817, obtained from the plaintiffs their indorsement on two notes, each for \$2,059.35.

¹ Colville v. Besly, 2 Denio 139.

² Ainslie v. Wilson, 7 Cow. 662, 668.

(*) Bennett v. Buchanan, 3 Ind. 47; Morrison v. Berkey, 7 S. & R. 238; Boulware v. Robinson, 8 Tex. 327.

(b) Robertson v. Maxcey, 6 Dana 101; McVicar v. Royce, 17 Up. Can. Q. B. 529.

The notes were indorsed to John B. Murray & Son, then again indorsed over, and paid by the subsequent indorser. The plaintiffs executed to the Murrays a mortgage on four lots (subject to a previous mortgage for \$1,770), as a security for the indorsements, and subsequently released the equity of redemption to the Murrays, who received the release as payment of \$1,200 on the plaintiffs' indorsement, and discharged them from all further liability as indorsers. Evidence was taken as to the value of the lots, and the jury found for the plaintiffs \$804.45. On a motion for a new trial, it was contended that the conveyance of land would not sustain an action for money paid; but the court, after deciding that under *Cumming v. Hackley*,¹ and *Taylor v. Higgins*,² the mortgage was no payment, used this language, as to the release of the equity of redemption: "We have no doubt that, as the conveyance of the land was received in discharge of a money debt due from the plaintiff, it is in judgment of law to be considered the same thing as if the plaintiff had actually paid money. The Murrays received it as money, or an equivalent for money. They had the right of electing. To the defendant it was immaterial whether the payment was made in one way or the other." And a new trial was denied. This case, however, leaves the question open as to the rate at which land under such circumstances is to be taken. The court say: "There is some question whether the equity of redemption, taken subject to the previous mortgage, was equal in value to the \$1,200. The jury found \$804.45 only; and, from the evidence, we think they were warranted in finding that amount." This would seem to imply that the actual and not agreed value of the land is to be the guide. Nor does the question appear to have been raised how

¹ 8 Johns. 202.

² 3 East 169

far the maker and principal debtor, Wilson, the defendant, was benefited by this transaction. The court say, that on the conveyance of the land at the agreed valuation of \$1,200, and the release of the plaintiff, Ainslie, "the remainder due on the notes constituted a valid claim in favor of the Murrays, against Wilson, the maker." But is it clear that the claim of the Murrays as against Wilson was good for *only* the remainder? If the Murrays had sued Wilson on the note, what, as between them, would have been the measure of damages? Could, in such an action, Wilson have had the benefit of the valuation of the land at \$1,200 to which he was not privy? As between the Murrays and Wilson, was the land satisfaction for anything more than it was actually worth? What if it had been foreclosed under the first mortgage, and no surplus realized, would Wilson have still had the benefit of the \$1,200 agreement?

In a subsequent case,¹ where the plaintiff, an accommodation maker, had paid the defendant's debt, after judgment recovered for \$401.61, by a conveyance of land for a consideration expressed in the deed of \$548.31, it was held, after affirming the main point decided in the last case, that the defendant was at liberty to reduce the amount of the recovery by showing that the land conveyed in satisfaction of the judgment was not of value equal to the amount of the note and interest; and this evidence having been excluded at the circuit, a new trial was ordered.** So where the land of the surety was sold on execution by the creditor, he may maintain an action; (*) and the same was held where a mortgage of the surety's land was accepted as payment. (b)

¹ Bonney v. Seely, 2 Wend. 481.

(*) Lord v. Staples, 23 N. H. 448.

(b) McVicar v. Royce, 17 Up. Can. Q. B. 529.

The same doctrine has been declared in Massachusetts. So under a plea of payment in an action of debt on judgment, the defendant is not confined to evidence of payment in money, but he may show that a chattel or deed of land was given and received in satisfaction of the judgment. He must, however, prove that the thing received was of the full value of the debt, or that it was agreed to be received as such.¹ So where the promissory note of a third party was indorsed by the surety and received by the creditor in payment of the debt, the surety may at once maintain an action,^(*) and the same is true where a note and mortgage of a third party is transferred by the surety to the creditor in payment.^(b) But taking possession of a mortgaged estate for the purpose of foreclosure, does not operate as a payment of the mortgage money ; for the land still remains only a security for the money.²

§ 801. **Compensation for actual loss only.**—In contracts of indemnity as elsewhere the ordinary rule is that actual compensation can only be given for actual loss,^(c) and that a surety who pays the debt of his principal for less than its face can recover only the amount he paid.^(d)

¹ *Howe v. Mackay*, 5 Pick. 44 ; and *dent of Newburyport Bank v. Stone*, 13 Pick. 420.

² *West v. Chamberlin*, 8 Pick. 336.

(*) *Hommell v. Gamewell*, 5 Blackf. 5.

(b) *Fahey v. Frawley*, 26 L. R. Ir. 78.

(c) See *Willson v. McEvoy*, 25 Cal. 169, where the cases are reviewed, and the principle above stated approved.

(d) *Ex parte Rushforth*, 10 Ves. 409 ; *Butcher v. Churchill*, 14 Ves. 567 ; *Reed v. Norris*, 2 My. & Cr. 361 ; *Coggeshall v. Ruggles*, 62 Ill. 401 (*semble*) ; *Pickett v. Bates*, 3 La. Ann. 627 ; *Martindale v. Brock*, 41 Md. 571 ; *Eaton v. Lambert*, 1 Neb. 339 ; *Cobb v. Titus*, 10 N. Y. 198 ; *Blow v. Maynard*, 2 Leigh 29. But see *contra*, *Fowler v. Strickland*, 107 Mass. 552, where an accommodation indorser having taken up a note for half its value was allowed to recover the face value from the maker. The attention of the court does not seem to have been called to the fact that the indorser was a surety.

And where the plaintiffs had sold the defendants three-sixteenths of a steamboat, the rest of which was owned by third parties, taking from the defendants an agreement to indemnify them against "all liability of loss" on account of the debts of the boat, it was held, in an action brought by the plaintiffs to recover the amount of a judgment against them for a debt of the boat, that they could not recover more than three-sixteenths of it until they had shown that they could not compel the other part owners, because of insolvency or for some other good cause, to contribute their proportion.^(*) So in an action by a sheriff against a surety in an indemnity bond given on an attachment, he is entitled to recover the whole amount of costs paid by him in the successful defense of an action brought against him by a claimant of the goods attached, and not merely a proportionate share, though other creditors who did not indemnify received the surplus proceeds of the goods attached, after satisfying the indemnifying creditors.^(b) And upon the same principle it is held that a surety who has paid the principal's debt in depreciated currency can only recover the value at the time of the payment, with interest.^(c) And a surety to a bond indemnifying a sheriff from damage, can show that he received a certain sum as proceeds of the sale.^(d) Where both principal and surety were sued, and judgment recovered, which the surety paid, the principal cannot claim a reduction in the amount to be repaid to the surety on the ground that usurious interest was in-

(*) *Ewing v. Reilly*, 34 Mo. 113.

(b) *Chamberlain v. Bellar*, 18 N. Y. 115.

(c) *Jordan v. Adams*, 7 Ark. 348; *Miles v. Bacon*, 4 J. J. Marsh 457; *Crozier v. Grayson*, 4 J. J. Marsh 514; *Gillespie v. Creswell*, 12 G. & J. 36; *Kendrick v. Forney*, 22 Gratt. 748; *Butler v. Butler*, 8 W. Va. 674; *Feamster v. Withrow*, 9 W. Va. 296.

(d) *O'Brien v. McCann*, 58 N. Y. 373.

cluded in the judgment.^(*) But if the surety knew, or should have known, that the claim was usurious, or that the principal was not bound to pay so much, his recovery will be reduced by the amount he ought not to have paid.^(b)

§ 802. Judgment against surety often conclusive on principal.—* It has been sometimes held that the record of judgment against the surety is conclusive evidence against his principal, and fixes the amount of recovery. So in an action by the sheriff against the sureties in a bond to the jail liberties, it was held, that the sheriff, having given notice to the defendants of the escape suit against himself, and they having thereupon assisted in its defense, the record of the recovery in that suit was conclusive evidence that the plaintiff had been damnified to the extent of the judgment.¹ So again, in an action by overseers of the poor on an order of bastardy to recover against the putative father the weekly sum directed to be paid for the maintenance of the child, the order was held to be *prima facie* evidence of the demand, and that it rested with the defendant to show himself exonerated from the payment, in order to avoid the recovery.²

¹ Kip v. Brigham, 6 Johns. 158.

² Wallsworth v. Mead, 9 Johns. 367. "A judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity." Clark v. Carrington, 7 Cranch 308, 322. "When one is responsible by force of law, or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other." Lowell v.

Parker, 10 Met. 309. See also Heard v. Lodge, 20 Pick. 53; Train v. Gold, 5 Pick. 380; Foxcroft v. Nevins, 4 Me. 72; Hayes v. Seaver, 7 Me. 237. In Vermont, if one promise to indemnify another for all damage, etc., which he shall incur in giving up to the promisor a certain horse, and in bringing a suit against the vendor thereof, for fraudulently selling a horse belonging to another, if he fail therein,—if the suit is brought, and the plaintiff defeated, the record of the judgment is competent evidence in a suit against the promisor founded on the promise, so far as to show the bringing and failure

(*) Thurston v. Prentiss, 1 Mich. 193; Wade v. Green, 3 Humph. 547.

(b) Jones v. Joyner, 8 Ga. 562 (*semble*); Lucking v. Gegg, 12 Bush. 298.

On this subject a few observations may be permitted. A judgment against the surety may, upon the ground of privity, be proper evidence against the principal, and *vice versa*; but it is manifest that the record can only be evidence of the facts which it declares and that payment is not one of these. The judgment, though perhaps conclusive evidence of the debt being incurred, is no proof whatever that that debt has been paid, or that it ever will be.^(a) **

The principle that it is conclusive evidence of the amount of the debt is illustrated by the following cases: In *Hare v. Grant*,^(b) the judgment procured against a surety was held conclusive where the surety notified the principal of the action. Where the defendant had failed to carry out, as he had agreed to do, the plaintiff's contracts with a third party, it was held that the plaintiff could recover the amount recovered by the third party against him.^(c) Where a contractor to lay pipes for a town had agreed to be liable for any damages occurring through his neglect, it was held, in *Campbell v. Somerville*,^(d) that the amount of his liability for a personal injury suffered by a third party, was conclusively determined by the judgment recovered against the town by that third party, where the plaintiff himself had defended the action with the town. Where defendant insured goods, making itself liable for the government tax, as well as for the value of the goods, the judgment of the

of the action : and this, though notice of the bringing of the suit was given to the defendant. But the amount of damages depends on the title to the horse ; and as to this the judgment is not evidence. *Lincoln v. Blanchard*, 17 Vt. 464.

(a) *Lyon v. Northup*, 17 Iowa 314.

(b) 77 N. C. 203.

(c) *Dubois v. Hermance*, 56 N. Y. 673.

(d) 114 Mass. 334.

government recovered against the assured was held to determine the amount of the defendant's liability.^(*) Where a sheriff levied wrongfully on property, owing to misrepresentations of the defendants, the defendants were held liable for the amount of the judgment recovered against the sheriff by the owner.^(b) In this case it appeared that the defendants had taken part in the defense of the action by the owner against the sheriff. *Norfolk v. American Steam Gas Co.*^(c) was a bill in equity brought against the officers of a company, that company having failed to pay a judgment obtained against it as trustee in trustee process. It was held that the plaintiff could recover the amount of the judgment obtained against the company. Where a defendant had made excavations in a sidewalk, by which a person was injured, and the plaintiff (a city) was held liable, the plaintiff was allowed to recover the amount of the judgment obtained against it.^(d) Where a sheriff was sued for the act of his deputy, who had notice of the suit, the judgment fixes the measure of damages in an action by the sheriff on the deputy's bond.^(e)

§ 803. **Litigation expenses.**—* Having thus examined the rules requiring the surety to pay before he proceeds against his principal, and also discussed the questions that present themselves as to the mode of payment, we have now to examine those cases where the surety is obliged to pay under compulsion of law, or where by reason of his engagement, he is put to indirect or consequential loss. Where the surety is compelled by suit to

(*) *Insurance Companies v. Thompson*, 95 U. S. 547.

(b) *Kenyon v. Woodruff*, 33 Mich. 310.

(c) 108 Mass. 404.

(d) *Ottumwa v. Parks*, 43 Ia. 119.

(e) *Kettle v. Lipe*, 6 Barb. 467.

pay the debt for which his principal is previously liable, or where a party holding an indemnity against a claim is obliged by legal proceedings to pay the demand in the first instance, the general rule is that he can recover against the principal or indemnitor, not only the amount which he has been obliged to pay, but also his costs incurred in defending the action ;^(*) ** and also his counsel fees and expenses, at least where he has an express contract of indemnity.^(b) * A party who makes, accepts, or indorses an accommodation note or bill for the accommodation of a party thereto, is regarded as a surety, and can charge such party with the costs of a suit for the collection of the note which he may have been compelled to pay.¹ So it has been held, as between the accommodation acceptor of a bill and the drawer ;² the accommodation indorser of a promissory note, and the maker ;³ as between the indorser of a note compelled to pay, and a party who had agreed to indemnify him on his indorsements.⁴ **

A surety is not liable for the costs of a suit against

¹ *Baker v. Martin*, 3 Barb. 634.

² *Jones v. Brooke*, 4 Taunt. 464.

³ *Hubbly v. Brown*, 16 Johns. 70. But an indorser of a regular bill of exchange who has been sued by the indorsee, is not entitled to recover from the acceptor the costs incurred in such action. There is no privity between them. *Dawson v. Morgan*, 9 B. & C. 618 ; *King v. Phillips*, *Peters C. C.*

350. Nor is the maker liable to pay the indorser his costs if he is sued. "The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to as indorser." *Simpson v. Griffin*, 9 Johns. 131.

⁴ *Mott v. Hicks*, 1 Cowen 513.

(*) *Smith v. Howell*, 6 Ex. 730 ; *Howard v. Lovegrove*, L. R. 6 Ex. 43 ; *Watson v. Hahn*, 1 Col. 385 ; *Keesling v. Frazier*, 119 Ind. 185 ; *Nutt v. Merrill*, 40 Me. 237 ; *Ripley v. Mosely*, 57 Me. 76, *Lindsey v. Parker*, 142 Mass. 582 ; *Whitworth v. Tilman*, 40 Miss. 76 ; *Apgar v. Hiler*, 24 N. J. L. 812 ; *Thompson v. Taylor*, 11 Hun 274 ; *Finckh v. Evers*, 25 Oh. St. 82 ; *Bennett v. Dowling*, 22 Tex. 660 ; *Downer v. Baxter*, 30 Vt. 467 ; *Spence v. Hector*, 24 Up. Can. Q. B. 277.

(b) *Howard v. Lovegrove*, L. R. 6 Ex. 43 ; *Ripley v. Mosely*, 57 Me. 76 ; *Lindsey v. Parker*, 142 Mass. 582 ; *Finckh v. Evers*, 25 Oh. St. 82.

the principal.^(*) But where a defendant guarantees the *collection* of a note, he is liable for the costs of an action against the maker.^(b) On a bond to indemnify the plaintiff against all costs and claims on account of doing some act, the plaintiff may recover the expense of an unfounded suit brought against him.^(c)

§ 804. *None where suit was unnecessary.*—* We have already had occasion to consider this question in regard to warranties; and it would seem that the liability for costs should depend on the grounds of the original litigation, and the notice given to the party sought to be charged with the costs. It would certainly be inequitable that a party should be obliged to defray the expense of a controversy, either unnecessary in itself, or which he might not have chosen to incur.^(d) "No person," says Lord Chief-Justice Denman,¹ "has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend." In this case, the defendant, as lessee of a certain house, had covenanted with his lessor to put and keep the premises in repair, under penalty of forfeiture, and in his assignment to the plaintiff had covenanted that all the covenants had been performed. The covenants had not been performed; the lease had become voidable; and the plaintiff having sub-assigned the lease to one Clark, with a covenant similar to that which he had received from the defendant, was

¹ *Short v. Kalloway*, 11 A. & E. 28.

(*) *Woodstock Bank v. Downer*, 27 Vt. 539.

(b) *Mosher v. Hotchkiss*, 3 Abb. App. 326; *Tuton v. Thayer*, 47 How. Pr. 180.

(c) *Newburgh v. Galatian*, 4 Cow. 340; *Chilson v. Downer*, 27 Vt. 536.

(d) *Redfield v. Haight*, 27 Conn. 31; *Whitworth v. Tilman*, 40 Miss. 76; *Holmes v. Weed*, 24 Barb. 546; *Hallock v. Belcher*, 42 Barb. 199.

sued by him (Clark), and obliged to pay £120 to settle the demand, together with £119 costs incurred in the defense; and it was held, for the above reason, that these costs could not be recovered over against the defendant. The principle of this decision has been repeatedly affirmed in cases where it has been held that it is not necessary for the surety to stand suit in order to charge his principal. So in New York, where the defendant gave the plaintiff a promise to indemnify him against an act which proved to be trespass, and the plaintiff being sued for the trespass gave a cognovit, it was held that, it satisfactorily appearing that the cognovit was not for too much, he was entitled to recover the amount of the judgment.¹

So, in Pennsylvania, it has been held that a surety is not bound to subject himself to costs by waiting till the creditor brings suit; but he may consult his own safety, provided it does not involve a wanton sacrifice of the interests of his principal.² So, again, in the same State, it is held that a surety cannot claim reimbursement for expenses unnecessarily incurred.³ This is in analogy also with the sound rule hereafter to be noticed in regard to real estate—that the vendor who holds a warranty may surrender to a paramount title, thereby only assuming the burden of proof that he did not surrender without just cause.⁴ And a very similar decision has been had in England:⁵ it was an action on the case for running down a ship, in consequence of which the plaintiffs were

¹ *Stone v. Hooker*, 9 Cow. 154.

² *Craig v. Craig*, 5 Rawle 91.

³ *Wynn v. Brooke*, 5 Rawle 106.

⁴ So, in Massachusetts, it has been said on the subject of eviction, "There is no necessity for the party holding a covenant of warranty to involve himself in a lawsuit to defend himself against a title which he is satisfied must

ultimately prevail. But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss; and in a suit against his warrantor, the burden of proof will be on the plaintiff." *Parsons, C. J.*, in *Hamilton v. Cutts*, 4 Mass. 349, 352.

⁵ *Tindall v. Bell*, 11 M. & W. 228.

obliged to accept the aid of salvors, and were compelled to pay a large sum of money, and certain costs in addition thereto. It appeared that the plaintiffs, after a negotiation with the salvors, who demanded £150, had tendered £20, and by a decision of the Admiralty were finally obliged to pay £45 damages, and £124 costs. The plaintiffs had a verdict for £45, with liberty to move to increase it by the amount of costs. It was held that it should have been left with the jury to say what a reasonable man would do under similar circumstances; and if the litigation were found to be prudently incurred, then the costs should be allowed; and Parke, B., said: "The parties were in the same situation as if the defendants had entered into a contract with the plaintiffs not to do the wrong complained of. That is not a contract of indemnity."** Where the sureties on a forthcoming bond refused to pay the amount of the original judgment, and defended an action on the bond, it was held that they could not recover from their principal the costs of the action on the bond. (*)

§ 805. Notice of suit.—* But if the suit be brought against the surety, and there appear good reason to resist the claim, then the further question arises as to notice. Its effect has been thus stated: "The purpose of giving notice is, not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." And in this case it was held that notice was not essential, and that the plaintiff

(*) Robinson v. Sherman, 2 Gratt. 178.

could recover his costs though no notice had been given.¹

Its operation has been still more clearly defined by Lord Chief-Justice Tenterden, in an action on a breach of the covenant of title : "The only effect of want of notice in such a case as this is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged ; that he made an improvident bargain, and that the defendant might have obtained better terms, if the opportunity had been given him." This was said in a case where the plaintiff had been obliged after suit to settle with a party claiming under title paramount ; and the court said : "As to the costs," incurred by the plaintiff in defending the action, "the plaintiff here had a right to claim an indemnity; and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney."² It may, therefore, be said that notice in these cases is not necessary ; if given, however, and the defendant neither endeavors to arrest the litigation, nor undertakes to direct it, he will be made responsible for its result ; (*) while, on the other hand, the only effect of not giving it, is to throw on the plaintiff the burden of showing that the first suit, the costs of which he claims, was not improperly contested.³

This view of the matter has been very fully stated by Mr.

¹ *Per* Buller, J., in *Duffield v. Scott*, 3 T. R. 374.

² *Smith v. Compton*, 3 B. & A. 407. Dumoulin considers the question of notice at length, and its effect on the expenses, both in the case when notice is given, and when not given ; and when given pending the suit ; and as to the motives for not giving : §§ 150-153.

³ Mr. Chitty says : "In cases of

guarantee, a notice of the claim and action of the creditor against the surety should always be given to the principal, with an intimation (if there be clearly no defense) that the action will be settled unless the party forthwith desire that it be defended ; and that he will be looked to for indemnity." Chitty on Contracts, 400; on Guaranties and Indemnities, *in notis*.

(*) *Brown v. Haven*, 37 Vt. 439 ; *Spence v. Hector*, 24 Up. Can. Q. B. 277.

Justice Story, on the Massachusetts Circuit, and applied to the subject of reinsurance ;¹ and the Supreme Court of the United States has declared, that a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity ;² and the law has been similarly declared in New Hampshire, on a suit upon an execution bond.³

To these general rules an exception was taken by Lord Chancellor Hardwicke as to extents. In an early case, where extent was taken out against a surety to the crown, and after contesting it some time, he paid the claim, and prosecuted his principal for the amount paid by him, including his expenses, it was insisted that, the debt being a just one, and improperly disputed, the principal should not be charged with the expense of the litigation ; but Lord Hardwicke said : “ I know of no such distinction ” ; and then taking notice that an extent is both an action and an execution, and that the surety could not be supposed prepared to pay the claim immediately, he allowed the demand.⁴ But the general rule seems well and clearly established, that the principal shall not be subjected to the expense of unnecessary litigation ; how the fact is to be arrived at, and on whom the burden of proof lies, will, as has been said, frequently turn on the question of notice. Where bail employed a third party to find the principal debtor, and then, refusing to pay the expenses of the person so employed, was sued and compelled to pay his bill with costs, it was held in a suit against the principal debtor that the bail could recover the sum paid, but not the costs ; Lord Ellenborough, at *Nisi Prius*, saying :

¹ *N. Y. State Marine Ins. Co. v. Protection Insurance Co.*, 1 Story 458.

² *Clark v. Carrington*, 7 Cranch 308, 322.

³ *French v. Parish*, 14 N. H. 496.

⁴ *Ex parte Marshall*, 1 Atk. 262.

"As for the costs of the action which the plaintiff took defense to unadvisedly, he should have either defended that action if the demand was unfounded, or paid the money if it could be legally claimed from him; but having defended that action without foundation, he cannot charge the defendant with the costs incurred in such an improvident defense."¹

In a case at *Nisi Prius*, where the plaintiff, an auctioneer, was employed by the defendant to sell an estate, and the title proved defective, the purchaser brought suit against the auctioneer for his deposit; the auctioneer gave notice to the defendant, who refused to defend the suit. The auctioneer then paid the deposit, with the purchaser's costs and his own, and brought suit against the defendant, claiming these costs and the excise duty on the sale. The action was *assumpsit* for money paid, with the usual money counts, but Lord Ellenborough held that, as to the costs, "there should have been a special count, inasmuch as the right to these costs by the plaintiff was not so apparent. The plaintiff might have defended the action of his own wrong, and without any authority from the defendant. If he had done so, he would not be entitled to call upon his principal to pay the costs, as they were incurred without his consent"; and, on the ground that the declaration should have been special, the costs were refused.^{1**}

* In a case on a guaranty to indemnify the plaintiff against the expense of a commission of bankruptcy, the messenger had sued the plaintiff for his bill of six pounds. The plaintiff defended the suit, and claimed sixty pounds

¹ *Fisher v. Fallows*, 5 Esp. 171. No action will lie by bail for his trouble or loss of time in taking a journey to become bail, because he does not undertake the journey as such, or labor as a

person employed by the defendant, but he does it as a friend, and to do him kindness. *Reason v. Wirdnam*, 1 C. & P. 434.

² *Spurrier v. Elderton*, 5 Esp. 1.

costs paid to the messenger in his suit, and also his own costs; but the claim was denied, Lord Tenterden saying: "I think the defendant is not liable for the costs beyond the writ; a man has no right, merely because he has an indemnity, to defend an action, and to put the person guaranteeing to useless expense."¹ But, on the other hand, where debt was brought by the plaintiff, as sheriff, against the defendants, on a bond given to the plaintiff as surety to the jail liberties for a debtor in execution, it appeared that the sheriff had given notice to the defendants, and that they assisted in the defense of the suit; it was held in New York that the costs of the suit against the plaintiff were properly recoverable against the defendants.²*** Where a surety allowed a suit to go by default without notice, he was only allowed to recover the costs incident on the service of the summons, as he should have notified his principal and allowed him to settle without further costs.^(*)

* The French law peremptorily requires notice, if the surety desires to charge the debtor with his expenses. Its language is clear: "The surety who has paid has recourse against the principal debtor, whether he entered into the contract of suretyship with or without the knowledge of the debtor. And he shall recover the principal, interest, and expenses; but the surety shall recover only such expenses as are incurred after the principal debtor is notified of the suit against the surety; and the surety shall also recover damages in a proper case."³***

* The same principles which we have been considering

¹ *Gillett v. Rippon*, 1 Moo. & Mal. 406. It is suggested in this case, by Gurney, of counsel for plaintiff, that "notice was given to the defendant, and he might have paid or stopped the action"; but nothing is said of any no-

tice in the statement of the case, which was at *Nisi Prius*. See *Freeman's Bank v. Rollins*, 13 Me. 202.

² *Kip v. Brigham*, 7 Johns. 168.

³ Code Civil, art. 2028.

(*) *Steinhart v. Doellner*, 34 N. Y. Super. Ct. 218.

are applied to claims made against sureties ; so it has been said, that if one becomes surety for a debtor, the creditor cannot recover from the surety the costs of a fruitless suit against the debtor unless he give notice of his intention to sue.¹** In New Hampshire, in a suit by a sheriff on a bond given by sureties of his deputy, conditioned to indemnify him against all loss, damages, and costs, on account of the acts and neglects of the deputy, he is entitled to receive, as damages, in addition to the sums paid by him or his sureties on his official bond to the county to satisfy judgments recovered against him for the default of the deputy, and interest thereon, all such reasonable expenses as were incurred by him in and about the defense of the suits in which the judgments were rendered, including counsel fees and a reasonable compensation for his personal services ; and in the suit on the bond the same expenses and compensation for services, beyond the taxable costs, but not the costs or expenses incurred in a suit upon his official bond, brought to enforce payment of such judgment ; and upon a judgment in favor of the sheriff for the penalty of the bond, execution will be awarded as well for the damages that may have accrued subsequently to the commencement of the suit upon the bond, as for those prior thereto.(*) So in New York, in an action by a sheriff against the sureties of his deputy to recover damages for the neglect of the deputy to levy on execution, in consequence of which the execution creditor has recovered a judgment against the sheriff, the reasonable expenses of the sheriff in defending the suit against himself are recoverable as a part of his damages.(b)

¹ *Baker v. Garratt*, 3 Bing. 56, *per* the sheriff for taking insufficient sureties Best, C. J. This was an action against on a replevin bond.

(*) *Hoitt v. Holcombe*, 32 N. H. 185.

(b) *Westervelt v. Smith*, 2 Duer 449 ; *acc.* *Robertson v. Morgan*, 3 B. Mon. 307.

§ 806. **Consequential loss.**—On a covenant to indemnify against all damages, costs, and expenses, by reason of a demand, the surety is not liable for a premium or bonus which the party is compelled to pay to raise the amount necessary to meet the demand,^(a) or for a loss through selling his property at a sacrifice to pay the debt.^(b) In an action on an indemnity bond, if the plaintiff states no special damage in his complaint, he is confined in his recovery to such only as arise from the breach, and then such only as are proximate and the fair, legal, and natural result of the act complained of.^(c) In a bond of indemnity from loss by reason of suits for infringement of a patent on goods sold by the defendant to the plaintiff, to be retailed by the latter, the plaintiff can recover the deterioration of his goods by attachment in the patent suit, but not for loss of credit by the attachment, or for the expense of a bond for dissolution of the attachment.^(d) Where the defendant guaranteed a debt which was secured by a second mortgage on property of the debtor, he was not liable for the cost of foreclosing the mortgage when it appeared that the prior mortgage had already been foreclosed.^(e) Where a surety on a stay bond, whose property has been sold in satisfaction of the judgment, moves for judgment against his principal, the measure of his damages is the amount of the judgment paid by the sale of his property, not the value of the property.^(f) But in Indiana it was held that where the defendant had engaged "to pay and satisfy the mortgage, together with all interest and costs thereon accrued, ac-

(a) *Low v. Archer*, 12 N. Y. 277.

(b) *Vance v. Lancaster*, 3 Hayw. 130.

(c) *Hallock v. Belcher*, 42 Barb. 199.

(d) *Ripley v. Mosely*, 57 Me. 76.

(e) *Peck v. Cohen*, 40 N. Y. Super. Ct. 142.

(f) *Coleman v. Riggs*, 61 Ia. 543.

cruing, and to accrue, and in every respect" save the plaintiff harmless, the value of the land sold in consequence of the breach of this engagement was held the measure of the plaintiff's damages.^(a) In a similar case, the plaintiff was allowed to recover his attorney's fees, expenses, and costs on account of the sale and in proceedings to redeem.^(b) Upon a bond to indemnify the plaintiff, a trustee, for loss in paying the defendant's debts, the plaintiff can recover the difference between the market price of bonds sold to pay the debts and the price actually obtained, plus the broker's commissions; but no damages can be obtained for a subsequent rise in the value of the bonds.^(c)

§ 807. Co-sureties.—* We have now to consider the relative rights and liabilities of co-sureties. The right of action of the surety against the co-surety or his representatives arises when the surety pays, and not before.¹ And in these cases the surety is entitled to recover against the co-surety, or, if more than one, against any of them, his aliquot portion of the sum paid. It is not necessary in such case to prove the insolvency either of the principal or of any of the co-sureties. But, on the other hand, the fact of the insolvency of the sureties will not increase the recovery against those who are solvent.* But where a surety sues a co-surety for contribution for money paid by the plaintiff on account of the principal, it has been held, in Alabama, that the defendant may show that the surety suing for contribution was indebted to the principal in a larger amount than

¹ *Wood v. Leland*, 1 Met. 387.

² *Cowell v. Edwards*, 2 B. & P. 268.

(a) *Atherton v. Williams*, 19 Ind. 105.

(b) *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

(c) *Beckley v. Munson*, 22 Conn. 299.

he was compelled as surety to pay for the principal, and thus defeat the claim for contribution.¹ **

In an action by sureties against the co-surety for contribution, where the debt was paid by a transfer of land the Supreme Court of Indiana said :

“ The price at which the lands were received in payment would, we think, ordinarily constitute the proper rule in such cases. If they were taken on a compromise of a doubtful claim, or from parties of doubtful solvency, at a price greatly above their value, perhaps the amount on which contribution by a co-surety would be estimated would be the actual value of the lands. The lands were the plaintiffs', and without regard to their cost they were clearly entitled to the increase in their value, or the legitimate profits made by their purchase, not, however, exceeding the amount paid by them on the debt for which the defendant was liable.” (*)

As between the two, we should suppose the lands must be taken at the value at which they were received in payment of the debt. The measure of the damages of the surety who has paid the debt is his co-surety's proportion of the amount so paid, and if it were paid in something else than money, then the same proportion of the amount of money for which the thing transferred was accepted by the creditor. The plaintiff can only recover what he has actually paid for the defendant. So where one of two joint promisors, on a note of \$100, paid \$75, he was allowed to recover only \$25, that being all he had paid or had alleged he had paid for the other.^(b) In an action for refusal to contribute to loss suffered in carrying stock, an agreement to *pro rata*

¹ Bezzell v. White, 13 Ala. 422.

(*) Jones v. Bradford, 25 Ind. 305, 308.

(b) Hall v. Hall, 42 Ind. 585 ; *acc.* Hearne v. Keath, 63 Mo. 84 ; Edmonds v. Sheahan, 47 Tex. 443.

the loss or gain was held to mean that the defendants were to share equally with the plaintiff the loss and gain, and not to mean that the defendants were to share among themselves the loss or gain and to indemnify the plaintiff for all loss suffered by him. (*)

§ 808. *Costs between co-sureties.*—* The question has been examined as to the right of the co-surety to be reimbursed for a proportion of any costs paid by him. In a case at Nisi Prius between co-sureties for a tax collector it appeared the plaintiff had been sued on the principal's default, and judgment had been recovered, and the plaintiff claimed, besides half the verdict against him, half the costs of both parties in the original suit. But Lord Chief-Justice Tenterden held, at Nisi Prius, that the defendant was only liable for half the verdict.¹ No question was made either as to notice or the necessity of the suit, nor, would it seem, could any such question properly arise between co-sureties.

But in a more recent case, in the Exchequer, where the plaintiff and defendant had executed, as co-sureties, a warrant of attorney given as a collateral security for a sum of money advanced on mortgage to the principal, and on default being made by the principal, judgment was entered upon the warrant of attorney, and execution issued against the plaintiff, it was held that he was entitled to recover from the defendant, as his co-surety, a moiety of the costs of such execution, Parke, B., saying: "They were costs incurred in a proceeding to recover a debt for which, on default of the principals, both the sureties were jointly liable; and the plaintiff having paid the whole

¹ *Knight v. Hughes*, 3 C. & P. 467; s. c. M. & M. 247.

(*) *Penniman v. Stanley*, 122 Mass. 310.

costs, I see no reason why the defendant should not pay his proportion."¹ (*)**

¹ *Kemp v. Finden*, 12 M. & W. 421. the former would seem the more correct in principle; for, as between the indorser and maker of a note, there is no contract to save harmless, and each surety should stand ready to pay the debt.

(*) *Bosley v. Taylor*, 5 Dana 157; *Davis v. Emerson*, 17 Me. 64; *Newcomb v. Gibson*, 127 Mass. 396; *Marsh v. Harrington*, 18 Vt. 150; *Fletcher v. Jackson*, 23 Vt. 581; *Briggs v. Boyd*, 37 Vt. 534.

CHAPTER XXVII.

THE MEASURE OF DAMAGES IN ACTIONS INVOLVING AGENCY.

§ 809. General principles.

I.—PRINCIPAL AGAINST AGENT.

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| § 810. Damages not controlled by form of action. | § 822. Sale below price fixed by principal. |
| 811. The law fixes the measure. | 823. Sale on wrong terms. |
| 812. Nominal damages. | 824. Neglect to sell. |
| 813. Actual loss the criterion. | 825. Agents to purchase—Neglect to purchase. |
| 814. Burden of proof. | 826. Purchase of wrong goods. |
| 815. Avoidable consequences. | 827. Purchase at excessive price. |
| 816. Proximate cause. | 828. Agents to deal in stock. |
| 817. Agents to insure. | 829. Agents to care for real estate. |
| 818. Liable only if insurer would have been. | 830. Agents to invest money in mortgage of land. |
| 819. Agents to collect mercantile instruments. | 831. Attorneys. |
| 820. Agent makes the debt his own. | 832. Auctioneers. |
| 821. Agents to sell—Unauthorized sale. | 833. Liability of sub-agents to agents. |

II.—AGENT AGAINST PRINCIPAL.

§ 834. Indemnity for loss or expense.

III.—THIRD PARTY AGAINST PRETENDED AGENT.

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| § 835. Liability for acting without authority. | § 837. Expense of litigation. |
| 836. Loss of bargain. | 838. Incidental expenses. |
| | 839. Unauthorized suits. |

§ 809. General principles.—Controversies involving questions of agency may arise between a principal and agent, or they may arise between the principal or agent and a third party. Controversies between principal and agent often involve peculiar questions of the measure of damages,

which it will be profitable to consider in a separate chapter. Controversies by principal or agent with a third party, however, seldom involve peculiar questions of the measure of damages. An action, whether by principal or by agent, against a third party is brought either on a contract entered into or a tort committed by the defendant, whose liability to the plaintiff, if it exists, is measured by a general rule of damages. So if a third party sues either principal or agent for the act of the agent, the measure of damages involves no peculiar question, but is determined by general rules. The question of agency involved in such an action is one of substantive law; namely, whether an action lies by or against the principal or agent. Where, however, one party sues the other for falsely representing that he had authority to act as agent, a peculiar rule of damages is involved; and though the defendant is not strictly an agent, the case will be conveniently considered along with cases of agency.

In this chapter, accordingly, will be considered the measure of damages: first, in actions by principal against agent; second, in actions by agent against principal; third, in actions by third parties against pretended agents.

PRINCIPAL AGAINST AGENT.

§ 810. *Damages not controlled by form of action.*—* The class of cases which we now proceed to consider presents some difficulty in regard to the arrangement of the subject, inasmuch as it is impossible, in considering it, to adhere closely to any line of division drawn from the forms of action. Demands made by principals against their agents may be said to arise either from the breach of the agent's contract or from the violation of his duty;

and the actions of assumpsit or case under the common-law practice can be indifferently used; in the one instance the proceeding being *ex contractu*, and in the other *ex delicto*. But inasmuch as the amount of damages, in the absence of any circumstance of fraud or other species of aggravation, is in either form of action a question of law under the control of the court, this branch of our subject, as well as that springing from the liability of common carriers, will be considered under the general head of contracts.

In regard to the contract of agency, there is a very interesting class of cases growing out of the liability of the principal for the act of the agent. The maxim of the civil law, *Qui facit per alium facit per se*, and the rule resulting therefrom of *Respondeat superior*, have been adopted in our law to an extent making the principal in many cases responsible for the negligence or want of skill of the party employed by him. There is also a large class of exceptions, where the person, though employed by another, still carries on a separate and independent calling, recognized by common usage;¹ but these cases rather regard the right of action than the measure of compensation; and so we turn to the rule of damages as between principal and agent where a clear cause of action exists.

It will also be observed that the questions embraced under the head which we are now considering, are very closely connected with another very large class of cases growing out of the relation of master and servant.** But questions arising out of this relation have been already considered.

¹ *Laugher v. Pointer*, 5 B. & C. 547
Quarman v. Burnett, 6 M. & W. 499
Rapson v. Cubitt, 9 M. & W. 710;
Milligan v. Wedge, 12 A. & E. 737;
Martin v. Temperley, 4 Q. B. 298. In

North Carolina, *Wiswall v. Brinson*,
 10 Ired. 554. See the subject well dis-
 cussed by Mullett, J., in *Blake v. Fer-
 ris*, 5 N. Y. 48, 59.

§ 811. **The law fixes the measure.**—* In some of the early cases growing out of the contract of agency it seems to have been held, with that disregard of any fixed rule which we have had occasion elsewhere to notice, that the jury had an unlimited control over the amount of compensation; thus, in an action against an attorney for negligence, “the jury were told they might find what damages they pleased.”¹ But, according to the more precise and much safer view of the subject now uniformly taken in all cases of tort, where no aggravation is proved, the law fixes the measure of damages; and more especially is this true in those cases which we are now considering, where the action, though it may be shaped so as to be technically, and in form, an action of tort, is in reality in all cases founded on a contract either express or implied.² **

* The law is perfectly clear, that wherever an agent violates his obligation to his principal, whether by exceeding his authority, by misconduct or omission, and any damage results to his principal, he is responsible for such injurious consequence, and bound to make indemnity.³ (*) ** In the language of Mr. Chief-Justice Marshall, “a person acting on commission, who by his misconduct has brought loss upon his principal, is responsible to the precise extent of the loss produced by that misconduct.” (b)

* In a case in the King’s Bench,⁴ the plaintiffs, who had shipped certain goods on board the *Mary Stevens*, to be carried from Liverpool to Trieste, brought their action against the owners of the ship, on the ground that the

¹ *Russel v. Palmer*, 2 Wils. 325.

² Story on Agency, ch. viii.

³ *Bank of Orange v. Brown*, 3 Wend.

⁴ *Parker v. James*, 4 Camp. 112.

(*) *Laverty v. Snethen*, 68 N. Y. 522; *Wilts v. Morrell*, 66 Barb. 511.

(b) *Hamilton v. Cunningham*, 32 Brock. 50, 366.

vessel had deviated, and having subsequently been captured, the plaintiffs had thus lost the benefit of a policy of insurance. The cost price of the goods, with the shipping charges, amounted to £4,411 13s. 9d. The plaintiffs had paid for premium of insurance, £720 16s. 6d. The defendants had paid the plaintiffs the sum of £4,411 13s. 9d., but refused to pay the £720 16s. 6d. And Lord Ellenborough said that the premiums were not recoverable.**

§ 812. **Nominal damages.**—* We have already seen, that wherever an engagement is broken, or an obligation violated, the law, in the absence of the proof of actual injury, infers nominal damage to have resulted from it. In regard to agents, however, language has been used from which it might be supposed that this class of cases formed an exception to the general rule, and that unless positive loss were shown to have resulted from the agent's illegal act, no recovery whatever could be had. Thus says Mr. Justice Story, "There must be a real loss or actual damage, and not merely a probable or possible one." And again: "It is a good defense, or rather excuse, that the misconduct of the agent has been followed by no loss or damage whatever to the principal; for then the rule applies, that though it is a wrong it is without any damage; and to maintain an action, both must concur, for *damnum absque injuria* and *injuria absque damno*, are equally objections to any recovery."¹ This language, however, has probably been used with reference rather to the compensation than the right of action; no distinction can be taken in this respect between the breach of an agent's engagements and that of any other contract; and if the inference of nominal damage from

¹ Story on Agency, §§ 222 and 236. See this passage cited in *Blot v. Boiceau*, 3 N. Y. 78.

any illegal act is correct and logical, it should apply uniformly to all transactions embraced within the wide domains of the law.** And it has accordingly been held that, though the principal shows no actual loss he may recover nominal damages; (*) even if the action is in form an action of tort, for it is really an action arising out of the contract. (b) There is, however, a class of cases where, the agency being entirely gratuitous, there is no contract relation between the principal and the agent. (c) If in such case the agent acts negligently it is questionable whether he would be liable to his principal except in case of actual loss.

§ 813. **Actual loss the criterion.**—* Assuming, then, that in the absence of proof of positive loss, nominal damage will be inferred, we have to consider those cases where actual injury results, and where, as we have said, the agent is bound to make it good. In applying this rule we shall find the distinction taken, to which we have already frequently alluded, between proximate and remote damage. The loss for which remuneration is sought need not be directly caused by the act done or omitted. It will be sufficient if it is a natural or a necessary consequence; but remote or merely possible consequences are excluded from consideration.

This principle will be best illustrated by the cases which have been decided; but it may be stated as a general rule, that in all cases of agency, whether the agent be one of private selection or *virtute officii*, whether factor or sheriff, the omission or misconduct

(*) *Van Wart v. Woolley*, 3 B. & C. 439; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Pennington v. Yell*, 11 Ark. 212; *Frothingham v. Everton*, 12 N. H. 239; *Blot v. Boiceau*, 3 N. Y. 78; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320; *Collier v. Pulliam*, 13 Lea 114.

(b) *McLeod v. Boulton*, 3 Up. Can. Q. B. 84.

(c) *Wilkinson v. Coverdale*, 1 Esp. 75.

of the agent in regard to the matter with which he is charged or intrusted renders him liable to the principal in damages ; and where he has been appointed to obtain or receive any given sum of money, or security therefor, and it appears that he was guilty of misconduct, and that the money or security was not obtained, these two facts will, in the absence of other proof, be treated as cause and effect. The negligence will be held to be the cause of the loss, and the sum of money in question or the security therefor will be *prima facie* the measure of damages sustained by the principal. Evidence, however, that such is not the case, that the negligence was not and could not have been the cause of the loss, or that the real damage is less, will throw the burden of proof back upon the plaintiff, and compel him to show the damage he has actually sustained by the neglect of the agent.**

This doctrine was not at first sanctioned in New York,(*) whéré it was held that if the misconduct of the agent was such as to involve the whole of the property intrusted to him, he should be held to answer for the value of the whole of the property ; and the defendant would not be allowed to show that the actual damage resulting from his misconduct was less. The contrary was, however, soon adjudged in an English case,(b) and that case was at once followed in New York.(c)

In a case in New York, the plaintiff, a Pennsylvania bank, sent a draft on a New York firm to the defendant, a New York bank, for collection. The defendant delivered the draft to the drawees, on receipt of their check for the amount ; but, through delay in pre-

(*) *Le Guen v. Gouverneur*, 1 Johns. Cas. 437 n. (a).

(b) *Van Wart v. Woolley*, 3 B. & C. 439.

(c) *Allen v. Suydam*, 20 Wend. 321.

senting the check, payment was refused, the drawees having failed before its presentation. The defendant thereupon returned the check, received back the draft, and protested it. The plaintiff claimed that the defendant was liable for the whole amount of the draft. The court, however, held that an agent "may show in reduction of the damages, that if he had used the greatest diligence the bill would not have been accepted or paid, or that his principal holds collaterals, or has an effectual remedy against the prior parties to the bill": and here, since it did not appear that the remedy against the drawer was lost, the plaintiff should have been allowed only nominal damages.^(*) At a second trial it was proved to have been adjudged, in a suit in Pennsylvania, that the drawer was discharged from liability on the draft; and the New York court thereupon awarded damages against the defendant to the full amount of the draft.^(b)

§ 814. **Burden of proof.**—When the principal shows that through the agent's negligence he has been obliged to pay money, or his property has been injured or destroyed, it is clear that, unless the agent proves facts that would reduce the apparent damage, the principal can recover the whole amount of his payment, or the whole value of his property. The burden is on the agent to reduce the damages. Thus where an attorney is employed to defend a claim, and negligently fails to do so, the burden is upon him to prove that the defence he was employed to make could not have succeeded.^(c) In an action for the price of goods sold by a factor,

(*) *First National Bank v. Fourth National Bank*, 77 N. Y. 320.

(b) *First National Bank v. Fourth National Bank*, 89 N. Y. 412.

(c) *Grayson v. Wilkinson*, 5 Sm. & M. 268, 289.

a verdict for the highest market price is proper, in the absence of proof of the price actually obtained.^(*)

But if the principal claims that through the agent's negligence he has failed to secure an expected gain, it seems clear that he should be obliged to prove the actual amount of his loss, and that in the absence of explicit proof of such loss, he should recover only nominal damages. And it is well established that in actions against agents for failure to collect claims, the plaintiff must show what loss, if any, has resulted from the agent's negligence.^(b) As Goldthwaite, J., said in *Bank of Mobile v. Huggins*, a case of suit against an agent for failure to collect a note,^(c) "The mere production of a paper, with a name signed to it, promising to pay a sum of money, does not import, necessarily, that the paper has any actual value. Its value depends entirely upon the ability of the parties to comply with what they have promised."^(d)

§ 815. **Avoidable consequences.**—On the principle of avoidable consequences, it has been held in New York

(*) *Clark v. Miller*, 4 Wend. 628.

(b) *Van Wart v. Woolley*, 3 B. & C. 439; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Pennington v. Yell*, 11 Ark. 212; *Slaute v. Favorite*, 107 Ind. 291; *Fox v. Davenport Nat. Bank*, 73 Ia. 649; *Eccles v. Stephenson*, 3 Bibb 517; *Borup v. Nininger*, 5 Minn. 523; *Joy v. Morgan*, 35 Minn. 184; *Frothingham v. Everton*, 12 N. H. 239; *First National Bank v. Fourth National Bank*, 77 N. Y. 320; *In re Cornell*, 110 N. Y. 351; *Stowe v. Bank of Cape Fear*, 3 Dev. 408; *Bruce v. Baxter*, 7 Lea 477, 481; *Collier v. Pulliam*, 13 Lea 114; *contra*, *Allen v. Suydam*, 20 Wend. 321; *Hoard v. Garner*, 3 Sandf. 179; *Brown v. Arrott*, 6 W. & S. 404; S. C. 6 Whart. 9.

(c) 3 Ala. 206, 219.

(d) The phrase *burden of proof* is constantly used in two different senses. The burden, in every action at law, is upon the plaintiff throughout to establish his case by a preponderance of evidence. In this sense the burden of proof never shifts. But the burden is also said to shift from one side to the other, when what is meant is that evidence as to a particular issue in a given state of the case, must come from one side or the other.

that where an agent wrongfully sells stock and communicates the fact to his principal, the latter can recover only the amount that the stock has advanced within a reasonable time after he learns of the agent's act, and is able to replace it, not the amount it may finally advance.^(*)

§ 816. **Proximate cause.**—* The damage, as we have heretofore had occasion to say, must be proximately caused by the act or omission of the agent, but it need not be the direct result of it. Thus, says Mr. J. Story, "If an agent knowingly deposit goods in an improper place, and a fire accidentally ensue, by which they are destroyed, he would be responsible for the loss"; and so the Master of the Rolls said, speaking of trustees, "If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them if guilty of previous negligence."¹ In these cases, though the loss is not the immediate consequence of the negligence, but of the fire, still it may be truly said that it would not have occurred except from such negligence.² So, if an agent, in procuring a policy of insurance, should so negligently execute his duty as that the risk (for example, a peril of the seas by which a loss was caused) should not be included, although the loss was directly owing to the peril of the seas, still it was proximately owing to the negligence of the agent, and the principal may accordingly recover.**

§ 817. **Agents to insure.**—* These questions very frequently arise between merchants and insurance brokers

¹ Story on Agency, § 218; *Caffrey v. Darby*, 6 Ves. 488, 496; *Davis v. Garrett*, 6 Bing. 716; *Wallace v. Swift*, 31 Up. Can. Q. B. 523.

² *Williams v. Littlefield*, 12 Wend. 362.

(*) *Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of the Metropolis*, 110 N. Y. 237. But see *ante*, § 520.

or factors. So in a case¹ where the defendants, in taking out a policy for the plaintiffs, had omitted "a liberty to touch at the Canary Islands," and having touched there, and being captured, the underwriters refused to pay on the ground of deviation, Lord Ellenborough held that the plaintiffs were entitled to recover a verdict for the sum insured, deducting the premiums. Again, in a case² where the defendant, in effecting a policy, had departed from his instructions, and the vessel being lost, the underwriters, in consequence of the agent's neglect, were not liable; two of the underwriters for £200 having paid the loss, and a third for the same sum having become bankrupt, Gibbs, C. J., held that the plaintiff was entitled to recover the amount directed to be insured, less the £400 paid, and the £200 subscribed by the bankrupt underwriter; and the plaintiff accordingly took a verdict for the balance.³

In a case in New York, where premiums had been paid at Savannah to an agent of underwriters doing business at New York, and a bill was filed against the company to compel the execution of a policy, Mr. Senator Colden said: "Suppose an action had been brought against the Savannah agent for not sending the premium to New York in due time, can there be a doubt but that the appellant would have recovered in a court of law, and that the measure of damages would have been the amount which was to have been insured, and for which the premium was paid?"⁴

Again, if an agent who is bound to procure insurance for his principal neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured

¹ Mallough v. Barber, 4 Campb. 150.

² Park v. Hamond, 4 Campb. 344.

³ See this case, 6 Taunt. 495, where a

new trial was refused, but nothing was said as to the measure of damages.

⁴ Perkins v. Washington Ins. Co., 4 Cow. 645, 664.

against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence.**

The English Common Bench seems at one time to have held that the measure of the principal's damages in such a case is a question of fact for the jury, and not a question of law. The consignor sued for loss of freight, and the defendant pleaded, as a plea of circuity of action, that it was the duty of the consignor to insure. The plaintiff demurred; and the question was, whether the damages for failure to insure were measured exactly by the amount of the loss. It was held that they were not so measured, and the demurrer was sustained. Jervis, C. J., and Maule, J., delivered elaborate opinions, the reasoning of which is not clear. The ground of the decision appears to be, that since the amount of loss at the time of the breach of duty could not certainly be said to equal the value of the property, the law can never say that the measure of damages is fixed at that amount. Thus Maule, J., said: "The question is, what damage has the party sustained at the time the cause of action vested in him? If nothing had happened, and a policy might then have been effected, the jury would consider what was probable; if the loss had then happened, they perhaps might have given the full amount, but they were not bound to do so; there were a variety of circumstances which they might properly take into their consideration." (°)

This case has never been overruled, or apparently even noticed, by any English court since it was decided. But, in a later case, the Court of Chancery held the opposite opinion.(°) In that case a bankrupt had failed to insure

(°) *Charles v. Altin*, 15 C. B. 46, 66.

(°) *Ex parte Bateman*, 8 De G. M. & G. 263, 268.

property of the petitioner, as he should have done, and the property was burned. The petitioner presented a claim for the value of the property, as a liquidated claim provable in bankruptcy, and the claim was allowed. Turner, L. J., said: "I apprehend that the value of the timber would be the measure of damages in an action for breach of the contract." The Court of Common Bench, in an opinion delivered by Erle, C. J., noticed this decision, calling it "the sound judgment of Lord Justice Turner," and said of the case: "The amount due for not insuring was precisely the same as would have been due for the same quantity of timber sold and delivered. It was held, therefore, to be equivalent to a debt, though technically a right to damages."(*)

This seems to establish the law in England on the true basis. In America it has never been doubted that the measure of damages was the exact amount of the loss. The leading case was on the Pennsylvania circuit,¹ where the learned Mr. Justice Washington charged:

"That if one merchant is in the habit of effecting insurances for his correspondent, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses as insurer, and is entitled to a premium as such. That the amount of loss for which an underwriter who had subscribed the policy would have been answerable is the only measure of damages against him. If he can excuse himself for not having effected the insurance, he is answerable for nothing; if he cannot excuse himself, he is then answerable for the whole."

And it appears that, on exception to the charge, this judgment was affirmed in the Supreme Court of the United States.(b)

¹ *Morris v. Summerl*, 2 Wash. C. C. 303.

(*) *Betteley v. Stainsby*, 12 C. B. (N. S.) 477, 499.

(b) *Acc. Schoenfeld v. Fleisher*, 73 Ill. 404; *Storer v. Eaton*, 50 Me. 219

The same point was laid down in another case, by the same able judge,¹ still more broadly :

"The law is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable not for damages merely, but as if he were himself the underwriter ; and he is, of course, entitled to the premium."

The language of the court above quoted is not to be taken as meaning that the agent could be sued on the contract of insurance, but that the measure of damages is the amount that could have been recovered on the policy, less the premiums. And in accordance with this view, it has been held in Maine that if an agent neglects to insure a cargo, and the vessel comes safe to port, he cannot claim to be an insurer and recover the premium.^(*)

* In an action against a broker for negligence or unskillfulness in effecting an insurance, "the plaintiff," says Mr. Sergeant Marshall,¹ "is entitled to recover the same amount as he might have recovered against the underwriters had the policy been properly effected." And so, says Mr. Phillips,² the agent "puts himself in the place of an underwriter, and must pay the loss, or the part of it for which the underwriter is not liable, but for which he would have been liable had the policy been made according to the instructions, or in such manner as the principal had a right to expect and require."³

¹ *De Tastett v. Crousillat*, 2 Wash. C. C. 132, 136.

² 2 Phillips' Insurance, 2d ed., 566.

³ Marshall on Insurance, 4th ed., p. 244.

⁴ *Delaney v. Stoddart*, 1 T. R. 22 ;
Wilkinson v. Coverdale, 1 Esp. 75 ;
Wallace v. Telfair, cited 1 Esp. 76 ;

(*semble*) ; *Ela v. French*, 11 N. H. 356 ; *Gray v. Murray*, 3 Johns. Ch. 167 ; *Beardsley v. Davis*, 52 Barb. 159 ; *Douglass v. Murphy*, 16 Up. Can. Q. B. 113.

(*) *Storer v. Eaton*, 50 Me. 219.

The same principle was applied in an action of assumpsit,¹ where the defendants had been employed as factors to settle with underwriters as for a total loss. The defendants adjusted the loss at 20 per cent., and cancelled the policy; and the court said: "If the defendants, as agents or factors of the plaintiffs, have, through mistake or design, disobeyed their instructions, they are undoubtedly responsible, and are to be considered as substituted for the insurers. This was a point conceded on the argument"; and a motion for a new trial on the ground of excessive damages was denied.**

§ 818. *Liable only if insurer would have been.*—* But the plaintiff can only have judgment for the same sum which in point of law he might have recovered on the policy, and not for any amount which the indulgence or liberality of the underwriters might possibly have induced them to pay. So,² where the plaintiff had requested insurance to be effected at Liverpool on certain slaves, and the defendant had neglected it, it was contended that though the plaintiff could not have recovered the value of the slaves in an action against the underwriters, yet that in point of fact these the slaves were frequently the subject of insurance at Liverpool, where the loss was always paid by the underwriters without disputing the question; and that consequently the plaintiff might recover the value of them in this action, because by means of the defendant's negligence the plaintiff had sustained the loss. "But the court were clearly of opinion that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could

Thorne v. Deas, 4 Johns. 84; Miner v. Tagert, 3 Binn. 204; De Tastett v. Crousillat, 2 Wash. C. C. 132; Hard-

ing v. Carter, 1 Park on Insurance, 7th ed., 4.

¹ Rundle v. Moore, 3 Johns. Cas. 36.

² Webster v. De Tastet, 7 T. R. 157.

have recovered *in an action* against the underwriters.”¹ And so, says Mr. Justice Story,² “there must be a real loss or actual damage, and not merely a probable or possible one.” So, if the ship deviate, or the voyage or insurance be illegal, or the principal had no interest, or the voyage as described in the order would not have covered the risk,—in all such cases the agent will not be responsible.

Nor will the plaintiff in such an action be allowed the costs of an unsuccessful suit against the underwriters, unless such action was necessary, or brought by the direction of the agent. So,³ where the plaintiff had been nonsuited in an action against the underwriters, on the ground of concealment of material information, and in the suit against his agent, claimed to include the costs of the action on the policy, Lord Eldon said, that there was no necessity to bring that action to entitle the plaintiff to recover in the aforesaid case, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the present defendant, he ought not to be charged with the costs of it; and this is in analogy to the rule, as we have seen it laid down between principal and surety. **

§ 819. Agents to collect mercantile instruments.—* If a bank receive a note for collection in another State, and neither collects it nor gives the owner notice of non-payment, nor returns it till barred by the statute of limitations, and there be no evidence of the insolvency of the maker, the measure of damages is the amount of the note less the charges for collection.⁴

It has been settled in New York, that on a deposit of

¹ *Fomin v. Oswell*, 3 Camp. 357.

² *Agency*, § 222.

³ *Seller v. Work*, Marsh. Insur. 4th Eng. ed. 243.

⁴ *Wingate v. Mechanics' Bank*, 10 Pa. St. 104.

the bill of exchange with a banker for collection in another State where it was payable, the banker was liable to the holder for any neglect or omission of duty, in respect of such collection on the part of his agent or the notary employed by him in the foreign State ;¹ and, on the authority of this case, it has also been decided that where a person undertakes the collection of a bond and mortgage, and covenants in express terms "*to take proper means to collect the mortgage*," he is responsible for the default of the solicitor employed by him.²*** The principal must, however, prove the amount of his loss, as has been seen ; and the measure of damages is the actual loss proved to have been sustained.^(*)

Where a bank collects notes for a depositor, and fails to pay over the amount of the notes on demand, the measure of damages is the value of the notes at the time of collection.^(b) In a New York case, the Bank of Wilmington was the owner of a bill of exchange payable at sight, at Troy, and indorsed and transmitted it to the Commercial Bank of Pennsylvania, under an arrangement by which the latter collected and retained the proceeds of paper thus remitted to it, and with the same redeemed the circulating notes of, and paid drafts drawn by, the Bank of Wilmington. The Commercial Bank indorsed and transmitted the bill to the Union

¹ Allen v. Merchants' Bank, 22 Wend. 215. ² Hoard v. Garner, 3 Sandf. 179.

(*) Van Wart v. Woolley, 3 B. & C. 439; Hamilton v. Cunningham, 2 Brock. 350, 366; Bank of Mobile v. Huggins, 3 Ala. 206; Tyson v. State Bank, 6 Blackf. 225; American Express Co. v. Dunlevy, 3 Amer. L. Reg. N. S. 266 (Ind.); Mitchell v. Shuert, 16 Mich. 444; Borup v. Nininger, 5 Minn. 523; Knapp v. U. S. & Canada Express Co., 55 N. H. 348; First National Bank v. Fourth National Bank, 89 N. Y. 412; Stowe v. Bank of Cape Fear, 3 Dev. (N. C.) 408.

(b) Planters' Bank v. Union Bank, 16 Wall. 483.

Bank of New York, its correspondent in New York, for collection, and the same was by the latter sent to the Troy City Bank for the same purpose. *Held*, that the Commercial Bank of Pennsylvania could recover of the Union Bank of New York the amount of the bill, if collected by the Troy City Bank, or if the same were lost by the omission of the latter to charge the drawer and indorser.^(*)

If an agent to collect a bill gives a defective notice of protest, and in a suit against the indorsers they are held discharged, it has been held that the holder of the bill cannot, in an action against the agent on his contract, recover the costs of his suit against the indorsers; for, as the court said, the suit was not brought on account of the defective notice. If the agent is to be charged with the costs of the suit, it must be in an action of tort, on the ground that he has falsely represented to his principal that he had given a proper notice.^(b) But this distinction seems hardly sound; for it is the duty of the agent, under his contract, to keep his principal informed of his acts.

§ 820. *Agent makes the debt his own.*—Where the agent to collect becomes himself the creditor of the debtor, as, for instance, by taking in payment of the original instrument a note in his own name, with the intention of becoming principal creditor thereon, the principal may recover the whole amount of the original instrument from the agent, notwithstanding the subsequent insolvency of the debtor.^(c) In a similar case it was said that a bank,

^(*) Commercial Bank of Pennsylvania *v.* Union Bank of New York, 11 N. Y. 203.

^(b) Downer *v.* Madison County Bank, 6 Hill 648.

^(c) Amory *v.* Hamilton, 17 Mass. 103; Symington *v.* McLin, 1 Dev. & Bat. 291.

acting as collecting agent for another, is liable, in case payment is lost through its negligence, for the full amount of the draft, though the drawee had failed, the defendant bank having become legal owner of the draft.^(*)

* In a case in Pennsylvania, where the principal sued the agent for neglect, the neglect complained of was in regard to the liability of the defendant for a debt of one Young, which he had failed to collect and secure. The plaintiff insisted that the defendant had, by his neglect, made himself liable for the whole amount of the debt. The defendant, on the other hand, contended that the plaintiff was bound to prove his actual loss, and that he could recover no more. But the Supreme Court of Pennsylvania held that the burden lay on the defendant, as to the actual loss; and, no such proof being given, that the defendant had made himself liable to the plaintiff for the full value of the goods placed in the hands of Young, or at least for the amount of money produced by the sales made of them. In this decision the court recognized as a general rule, however, that for an agent's omission to keep the principal regularly informed of the agent's transactions and the state of the interests intrusted to him, the measure of damages is to be proportioned to the actual loss sustained; with the exception, where the information transmitted is such as to induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, that in such case the agent makes the debt his own.^{1**}

§ 821. Agents to sell—Unauthorized sale.—Where goods are consigned to an agent with instructions not to sell for

¹ *Brown v. Arrott*, 6 W. & S. 402; s. *Rawle* 223; *Amory v. Hamilton*, 17 C. 6 Whart. 9; *Harvey v. Turner*, 4 Mass. 103.

(*) *Trinidad National Bank v. Denver National Bank*, 4 Dill. 290.

a certain time, and the agent sells before that time, he is liable for the difference between the price at the time when the goods were sold and the price at the time when they should have been sold ; (*) or the wrongful sale may be treated as a conversion of the goods, and the principal may elect to recover the value at the time of sale. * Thus in an action¹ brought by principal against factor, for selling cotton contrary to orders, it appeared that it was sold on the third day of June, and the plaintiff insisted it should not have been sold before the twenty-third of August. The Supreme Court of the United States said :

“ Supposing the sale made by the defendants on the third of June to have been tortious and in violation of orders, the plaintiff had his election, either to claim damages for the value of the cotton on that day, as a case of tortious conversion, or for the value of the cotton the twenty-third of August following, when the letter of the plaintiff of the twenty-third of July was received, which authorized a sale. If the price of cotton was higher on that day than at any intermediate period, he was entitled to the benefit thereof. If, on the other hand, the price was lower, he could not justly be said to be damnified to any extent beyond what he would lose by the difference of the price of cotton on the third of June and the price on the twenty-third of August.” **

When a factor intrusted with goods for sale on commission, pledges them for advances made to him, and gives the pledgee authority to sell them to reimburse himself, this is a conversion, and the rule of damages to which the principal is entitled is the difference between the value of the goods at the time of the conversion and their proceeds when sold by the pledgee.(^b) But in

¹ *Brown v. M'Gran*, 14 Pet. 479, 496.

(*) *Fordyce v. Peper*, 16 Fed. Rep. 516; *Gray v. Bass*, 42 Ga. 270; *Thompson v. Gwyn*, 46 Miss. 522.

(^b) *Kelly v. Smith*, 1 Blatch. 290.

Canada where stock was deposited as collateral, and the pledgee was authorized to sell on default of payment, it was held, when the pledgee sold before default, that the measure of damages was the highest market price of the stock between the time of sale and the time when default was actually made; the rule of higher intermediate value being adopted.^(*)

In a Massachusetts case the defendant was agent of the plaintiff to sell certain rights in stock at a minimum price. The defendant, without the plaintiff's knowledge, took the rights himself at the limited price, which was less than the market price. In an action by the principal, the agent was held liable for the difference between the price at which he took the rights and the market price at the time, with interest; but not for dividends since paid on the stock.^(b)

§ 822. *Sale below price fixed by principal.*—Authorities are in conflict as to the measure of damages in case the agent sells at a price below that fixed by the principal. It was once held that in such case the agent, having wilfully deprived the principal of the benefit of an expected rise in the market, should be held to pay the price set by the principal;^(c) and it was urged that any other rule would allow the agent to defraud his principal with impunity. But it soon became apparent that the principal by this rule was generally more than compensated; and the rule that he could recover only the actual value of the property, and not necessarily the value he had put upon it, prevailed.^(d) * So when the plaintiff had instructed the defendant not to sell a horse for less than

(*) *Carnegie v. Federal Bank of Canada*, 5 Ont. 418.

(b) *Greenfield Savings Bank v. Simons*, 133 Mass. 415.

(c) *Switzer v. Connett*, 11 Mo. 88; *Guy v. Oakley*, 13 Johns. 332.

(d) *Patterson v. Currier*, 106 Mass. 410; *Dalby v. Stearns*, 132 Mass. 230; *Blot v. Boiceau*, 3 N. Y. 78; *Bigelow v. Walker*, 24 Vt. 149.

\$500, and the orders were disobeyed, it was nevertheless held that, notwithstanding the instructions, the plaintiff could only recover the actual value of the animal.¹ **

The question, however, remained, at what time the value of the property was to be estimated. If the principal were allowed to recover only the market value of the property at the time of the sale, he would lose all the benefit of his foresight, if the value afterwards rose. The cases accordingly have allowed him the benefit of a rise in value. In some jurisdictions he is allowed to recover the highest market price until suit brought,^(*) or even until trial.^(b)

* So in the State of Alabama, where an agent was instructed not to sell cotton for less than fourteen cents a pound, it was held that a disregard of these orders did not authorize the principal to recover up to the limit he had set, but that the criterion was the price at which other cotton of that quality had been sold during the season.¹ **

* In *Nelson v. Morgan*,² where wine was consigned by a New York house to the defendant, a New Orleans agent, to sell at a limited price, the defendant, after keeping it a long time on hand, reshipped it, without further directions, to the plaintiffs at New York; who received it, but under protest, and wrote to the defendant that they abandoned the property, and held it merely as belonging to the defendant, and subject to his order. It was afterwards sold by them at auction in New York, but at a price below the first limit, and they then sued the defend-

¹ *Ainsworth v. Partillo*, 13 Ala. 460. ² 2 Martin (La.) 256.

³ *Austill v. Crawford*, 7 Ala. 335.

(*) *Nelson v. Morgan*, 2 Martin (La.) 256.

(b) *Rollins v. Duffy*, 18 Ill. App. 398; *Taylor v. Ketchum*, 5 Robt. 507.

ant for the damages resulting from the disobedience of their orders, insisting that they were entitled to recover the full value of the wine. But the Supreme Court of Louisiana held that the measure of damages ought to be the value of the wine at the highest market price in New Orleans, at any time before the suit brought, adding thereto the freight to New York, and deducting therefrom the value of the wine at New York, where the plaintiffs resold it.** Where a consignee was instructed, unless he could obtain 22s. a barrel for a cargo of flour on its arrival, to hold it until a newly enacted tariff should "have produced its results," but sold it prematurely and in violation of the instructions, as was found by the jury to whom the question of violation was submitted at the trial, it was held by the Superior Court of the city of New York that in computing the damages to be recovered, if any, by the consignor, the jury were to determine the time when the flour might reasonably and prudently have been sold, and having done so, the consignee was to be charged with the amount. His advances and expenses were to be credited him with interest, and the balance with interest from the time the sale might have properly been made, the plaintiff was entitled to recover.(*) The judgment was reversed by the Court of Appeals(b) on the ground that the factors had been vested with a discretion which they had rightfully exercised, and did not violate their instructions. The rule of damages was therefore not considered on the appeal.

The true rule, however, seems to be that the highest market value for a reasonable time after notice of the

(*) *Milbank v. Dennistoun*, 1 Bosw. 246.

(b) 21 N. Y. 386.

sale can be recovered,^(*) for in these cases the act of the defendant results in depriving the plaintiff of his property for a time, during which he is entitled to the benefit of any value it may have had, even the highest. In a case in Massachusetts, where the action was against factors for the breach of an agreement not to sell tobacco at less than forty cents a pound, but to hold it subject to the plaintiff's orders till they should sell it at that price, the plaintiff was allowed to recover for the loss sustained, by a failure to obey his orders, an amount not exceeding forty cents a pound, or the market value at the time when the return of the tobacco was demanded. The increase of market value up to forty cents a pound before the demand, was an item of damage. This ruling was sustained.^(b) In delivering the opinion of the court, Mr. Justice Foster uses the following language: "We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others, that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after the sale in violation of instructions."

Unless, however, it appears that the market value of the property rose after the sale, the agent, upon proving that he sold the goods at the market price, will be liable for only nominal damages.^(c) * In *Frothingham v. Everton*,¹ it was held that where goods are consigned to a

¹ 12 N. H. 239.

(*) *Loraine v. Cartwright*, 3 Wash. C. C. 151, and cases cited below. See this whole subject discussed in chap. xv.

(b) *Maynard v. Pease*, 99 Mass. 555.

(c) *Frothingham v. Everton*, 12 N. H. 239; *Blot v. Boiceau*, 3 N. Y. 78; *Hinde v. Smith*, 6 Lans. 464.

commission merchant or factor for sale, and the factor sells at a price below the limit without notice, the consignor may recover damages, or may have the amount of the damages allowed in a suit brought by the factor to recover his advances. The measure of damages in such a case is the amount of injury sustained by the sale contrary to the orders of the principal. If no actual loss appeared to have been sustained in consequence of the wrongful act, the principal will be entitled only to nominal damages. And in accordance with this case it was held in *Blot v. Boiceau*,¹ where a factor sold contrary to his principal's orders, and below his limits, that he could discharge himself from liability by showing that the articles in question could not be made to bring more than the sum which they produced, or, in other words, that the goods were never worth more than they actually sold for.^(*) **

§ 823. *Sale on wrong terms.*—* In Pennsylvania, where a party in London consigned goods to a correspondent in Philadelphia, to be delivered to a third party, only in case of his paying the amount or giving satisfactory security, and the agent delivered the goods without requiring either payment or security, it was held that the agent had thereby made himself liable for the full amount of the original debt, with a reasonable compensation for the delay of payment.[†]

Such, too, is the language of all the most eminent

¹ 3 N. Y. 78.

[†] *Walker v. Smith*, 4 Dall. 389.

(*) Bronson, J., intimated (p. 87) that where the property consists of articles which have no market value, such, for example, as antique paintings, statues, or vases, the rule will not apply, and the principal may recover the price he set upon the property. It would seem, however, that the true principle in such a case would be to make such proof of the real value as may be possible. There is no principle of compensation which should allow the plaintiff to fix his own measure of damages.

authors of our law. "In this," to use the clear language of Mr. Sergeant Marshall,¹ "as in all other cases where a man, either by an express or implied undertaking, engages to do an act for another, and he either wholly neglects to do it, or does it improperly or unskilfully, an action on the case will lie against him for the loss or damage resulting from his negligence, carelessness, or want of skill." **

So in a case in the English Common Pleas, where agents, notwithstanding what the jury found were instructions not to part with certain goods consigned to them until they had received their price, caused the goods on their arrival in London to be transhipped on board a vessel named by them, taking the mate's receipt in their own names, and the vessel sailed to Melbourne with the goods on board without the vendee paying for them, the agents were held liable, and the value of the goods was the measure of the plaintiff's damages.^(*) In *Crawford v. Cockran*,^(b) the defendant was the plaintiff's agent to sell logs. Instead of having the official "scaler" measure the logs, he negligently allowed the purchaser to do so, and the measurement was too small. The measure of damages was held to be the difference between the true value of the logs and the price obtained for them. In *Howe v. Sutherland*,^(c) the defendant sold oats for future delivery on account of the plaintiff, but negligently failed to require a deposit from the vendee. The price of oats having fallen, and the vendee having become insolvent, it was held that the plaintiff could recover the

¹ On Insurance, 4th ed., p. 242.

(*) *Stearine Kaarsen Fabrick Gonda Co. v. Heintzmann*, 17 C. B. N. S. 56.

(b) 2 Wash. 117.

(c) 39 Ia. 484.

difference between the amount for which the oats were first sold and that obtained on resale.

§ 824. **Neglect to sell.**—Where a principal consigns property to his factor with instructions to sell it *upon its arrival*, the latter is bound to follow the instructions, and sell for the price it will command; and if he do not, he will become liable for the damage his principal may sustain in case of a fall in the market.^(*) The damages in such a case are the difference between the amount finally realized, and that which would have been realized at once had the principal's instructions been obeyed.^(°) But as in the case of sale at wrong price, the principal cannot recover more than the market price at the time when the goods should have been sold. So where a factor neglected to sell bales of wool consigned to him by the plaintiff, it was held error to charge the jury that the plaintiff could recover the highest price between the time when the order to sell was received and the time of the trial, Miller, J., saying that he could recover the value within a reasonable time after the order was received.^(°)

§ 825. **Agents to purchase—Neglect to purchase.**—* A case in the Supreme Court of the United States¹ exhibits another species of injury inflicted by an agent on a principal. Cunningham & Co., of Boston, owners of the *Halcyon* sent her from Havana to the defendants below, Bell, De Yough & Co., with directions to invest of the freight (which was about 4,600 pesos), 2,200 pesos in marble tiles, and the balance in wrapping paper, to be

¹ Bell v. Cunningham, 3 Pet. 69.

(*) Evans v. Root, 7 N. Y. 186.

(°) Cothran v. Ellis, 107 Ill. 413; Atkinson v. Burton, 4 Bush 299; Howland v. Davis, 40 Mich. 545; Allen v. McConihe, 12 N. Y. Suppl. 232.

(°) Whelan v. Lynch, 60 N. Y. 469.

shipped by the same vessel to Havana. The defendants disobeyed the directions, and invested the whole in wrapping paper. The tiles would have made a considerable profit; the paper made a heavy loss. Trial and verdict for the plaintiff; exception and writ of error. The plaintiffs in error (the defendants below) insisted that Cunningham & Co. were entitled to no more than the value of the money at Leghorn, which ought to have been invested in tiles, and not its value in Havana; or, in other words, that the value of 2,200 pesos at Leghorn, with interest, and not the value of the tiles at Havana, ought to be given. But the court overruled this, saying, that it would be tantamount to a declaration that the breach of contract consisted in the *non-payment* of two thousand two hundred pesos, not in the *failure to invest that sum* in tiles. Speculative damages dependent on possible successive schemes, ought never to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus, in this case, an estimate of possible profit to be derived from investments at Havana of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves at Havana affords a reasonable standard for the estimate of damages.¹

So in Louisiana, an agent failing to ship goods, which he was directed by the principal to do, is liable for the actual value of the goods at the port of destination.² It

¹ This case will be found reported at Nisi Prius, 5 Mason 161, where Story, J., told the jury in very general terms, that they were at liberty to compensate the plaintiffs for the actual loss sustained in consequence of the defendant's default, but were not at liberty to give vindictive damages.

² *Ryder v. Thayer*, 3 La. Ann. 149. In this case exemplary damages were claimed; but the court said: "In case of a breach of contract, by the negligence or fraud of a party no other sum can be allowed as damages than that which fully indemnifies the creditor."

is proper to notice that this allowance of the value which the goods would have had at the place intended for the sale amounts to an allowance of profits, on the principles which we have heretofore had occasion to consider ; ** but when it can be proved with reasonable certainty, as in such cases, what profits would have been earned, and such profits were within the contemplation of the parties when the agent was ordered to buy the goods, the plaintiff is entitled to recover them. (*)

§ 826. **Purchase of wrong goods.**—In an English case an agent at Hong Kong, instructed to purchase a certain grade of opium and ship it to England, bought and shipped an inferior grade. No opium of the grade ordered could have been purchased in Hong Kong at the time. It was held that the agent was liable for the actual loss of his principal—that is, for the cost of the opium and the expense of importation and sale, less the amount obtained by sale of it ; but that he was not liable for the value of the better grade of opium at the port of destination—that is, for expected profits. (b)

It is to be observed that in this case it was not possible for the agent to buy the opium ordered, and consequently the case differs from *Bell v. Cunningham*. The court noticed the latter case, but declined to give any opinion of its correctness.

§ 827. **Purchase at excessive price.**—An agent to buy paid too high a price, in fraud of his principal. It was held that the principal could recover only the difference between the price paid by the agent and the market price of the goods at the time of purchase. (c)

(*) *Farwell v. Price*, 30 Mo. 587 ; *Heinemann v. Heard*, 50 N. Y. 27.

(b) *Cassaboglou v. Gibb*, 9 Q. B. D. 220 ; 11 Q. B. Div. 797.

(c) *McMillan v. Arthur*, 98 N. Y. 167.

§ 828. *Agents to deal in stocks.*—Where a stock-broker, in the course of his dealing for his principal, fails to use skill and good judgment in buying or selling, he is liable for the actual loss. When the transaction is on a “margin,” it may be the broker’s duty to close it at a favorable time ; and in that case if he negligently closes it without waiting a reasonable time, he is liable for the difference between the amount realized and what would have been obtained by waiting till a proper time. In *Harris v. Tumbridge*,^(*) the defendant, a stock-broker, bought for the plaintiff a “straddle,” that is, an option to buy or sell a certain stock at a certain price within the time limited. Instead of waiting for a proper time to exercise the option, the defendant sold the stock “short” for the plaintiff next day. The court said : “She is entitled to recover what she has lost by his neglect ; and the price of the stock from day to day during the remainder of the option having been shown, it was for the jury to determine the amount.” This does not mean that the measure of damages is in the hands of the jury. They are to determine the time when the defendant should have closed the transaction, and the variations in the price of stock is evidence from which they may determine when the option should have been exercised ; that determined, the damages, as a matter of law, are measured by the price of stock at that time.

If the broker neglects to buy or sell, or buys or sells too soon, the damages in New York are, as we have seen, measured by the value of the stock within a reasonable time after notice of that fact has been received by the customer.^(b) In *White v. Smith*,^(c) the defendant, a

(*) 83 N. Y. 92, 99.

(b) *Baker v. Drake*, 53 N. Y. 211 ; *Colt v. Owens*, 90 N. Y. 368. See § 524.

(c) 54 N. Y. 522.

broker, sold for the plaintiff 100 shares "short" at 186. He afterwards bought 100 shares to cover the sale without notifying the plaintiff and without the plaintiff's authority. Subsequently the plaintiff sent an order to buy when the stock was at 180. The plaintiff was allowed to recover the difference between the price at which the stock was sold short and the market price upon the day when the order was received to purchase, with interest, deducting, however, commissions. If a broker illegally transfers the stock to his own name, the principal has a right to demand the price of the stock on that day, or to disaffirm the broker's act and recover for any rise in the market within a reasonable time.^(a)

§ 829. *Agents to care for real estate.*—In *Tuers v. Tuers*,^(b) the defendant was an agent to collect the rents from the plaintiff's real estate, and to pay out of the rents the taxes and water-rents. He collected the rents, and retained enough to pay the taxes, but did not pay them. The plaintiff was required to pay an increased rate of interest on the overdue taxes, and a mortgagee commenced foreclosure proceedings on account of the non-payment of taxes. It was held that the plaintiff was entitled to recover something on account of these facts; but just what amount could be recovered, not being before the court, could not be decided. In *Blood v. Wilkins*^(c) the court said :

"Where one person furnishes money to another to discharge an incumbrance from the land of the person furnishing the money, and the person undertaking to discharge the incumbrance neglects to do it, and the land is lost to the owner by reason of the incumbrance, the measure of damages may be the money furnished with interest, or the value of the land lost, according

(a) *Parsons v. Martin*, 11 Gray 111; *Taussig v. Hart*, 49 N. Y. 301.

(b) 100 N. Y. 196.

(c) 43 Ia. 565, 567.

to circumstances. If the land owner has knowledge of his agent's failure in time to redeem the land himself, his damages will be the money furnished with interest. But if the land owner justly relies upon his agent, to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, then the agent will be liable for the value of the land at the time it is lost."

The plaintiff's title having been lost by tax sales, it was held that the measure of damages was the value of the land at the time when the redemption from tax sales expired.

The agent of a town to keep its roads in repair negligently allowed the roads to fall into disrepair. It was held that the agent was liable to the town for damages paid to a person injured through the bad state of the roads, and for the costs and incidental expenses of the suit brought by the injured person, as well as for the expense of properly repairing the roads.^(*)

§ 830. Agents to invest money in mortgage of land.—An agent to invest money in a mortgage who fails to find a prior incumbrance which is on the land is liable for the loss that results. If the principal discovers and removes the prior incumbrance, the measure of damages is the amount paid to remove the incumbrance,^(b) even though part of the land covered by the mortgage was not subject to the prior incumbrance.^(c) But if the principal does not discover the existence of the prior incumbrance until the land is sold to satisfy it and lost to him, the measure of his damages is the amount of his loan.^(d)

(*) *Wilson v. Greensboro*, 54 Vt. 533.

(b) *McFarland v. McClees*, 17 W. N. C. 547; *Harrison v. Brega*, 20 Up. Can. Q. B. 324.

(c) *Whiteman v. Hawkins*, 4 C. P. D. 13.

(d) *Shipherd v. Field*, 70 Ill. 438.

Where an agent takes a mortgage signed by a husband alone, without release of dower, he is liable for the actual loss; which would be the amount by which the loan exceeded the value of the husband's interest, but no more in any case than the value of the wife's interest in the land.^(a)

§ 831. *Attorneys.*—The liability of an attorney who is negligent in the prosecution of a claim is for the actual loss, not necessarily for the amount of the claim. If the debtor continues solvent or was insolvent at the time the attorney took the claim, or if there is valid security, the measure of damages will be less than the amount of the claim.^(b) If an attorney is negligent in the defense of a suit, the measure of damages is not necessarily the amount that is recovered in that suit from the client. The attorney may show, for instance, that the defense he was employed to make was not a good one.^(c) Where an attorney, who had been employed to complete a purchase of leasehold property which had been bought at auction by his client, on conditions requiring that the purchaser should take an under lease and not demand an abstract of the vendor's title, nor inquire into that of the lessor, made no inquiries, but simply got what purported to be a lease executed by the pretended seller, but which recited no title, the pretended seller having none, and the purchaser was evicted by the real owner, it was held that the attorney had been guilty of negligence for which his estate was liable in damages, the proper meas-

(^a) *Slauter v. Favorite*, 107 Ind. 291.

(^b) *Russel v. Palmer*, 2 Wils. 325; *Pennington v. Yell*, 11 Ark. 212; *Huntington v. Rumnill*, 3 Day 390; *Cox v. Sullivan*, 7 Ga. 144; *Stevens v. Walker*, 55 Ill. 151; *Eccles v. Stephenson*, 3 Bibb 517; *Crooker v. Hutchinson*, 2 D. Chip. (Vt.) 117.

(^c) *Grayson v. Wilkinson*, 5 Sm. & M. 268, 289.

ure of which was the sum which the plaintiff (who had bought back the property) had been obliged to pay to get the title, with interest, and without deduction for rent, as he was liable over for mesne profits during the time he had occupied the premises rent free.^(*) In an action against an attorney for failure to perform services agreed upon, the plaintiff recovers the value of the services.^(b)

§ 832. Auctioneers.—Where an auctioneer failed to demand a deposit, according to the terms of sale, and the vendee did not take the property, it was held that the owner might recover of the auctioneer the difference between the price bid and that which could be obtained on a resale.^(c)

§ 833. Liability of sub-agents to agents.—* It has been held, that where a factor employs a sub-agent for the purpose of carrying out the instructions of the principal, if the sub-agent, by neglecting the directions of the factor, commit a breach of duty for which the factor is compelled to answer the principal in damages, the factor will be entitled to recover over from the sub-agent the damages which he has so sustained. This is the measure of his damages.^(d) Thus,¹ where the plaintiff had been commissioned by Gevers & Co. to ship a quantity of *best* Porto Rico tobacco for them to Holland, the defendants were employed by the plaintiff to execute the order, but bought Porto Rico tobacco *not* of the best quality, and which was proved at the trial to be very bad. Gevers & Co. refused to receive it, and sued the present

¹ *Mainwaring v. Brandon*, 8 Taunt. 302.

(*) *Allen v. Clark*, 7 L. T. Rep. 781; 11 W. R. 304.

(b) *Quinn v. Van Pelt*, 56 N. Y. 417.

(c) *Hibbert v. Bayley*, 2 F. & F. 48.

(d) *Bidwell v. Madison*, 10 Minn. 13.

plaintiff. He notified the defendants to furnish a defense to the action. Gevers & Co. recovered, and it was contended, in the action against the sub-agent, that the measure of damages was the amount recovered by Gevers & Co. in the former suit, with the costs thereof. The defendants insisted that the true measure of damages was either the difference between the relative prices of the article in the London market, or between the relative values in the market in Holland; but the court held that the measure of relief should be the damages and costs recovered in the first action against the plaintiff—the plaintiff undertaking to assign the tobacco to the defendants, or to sell it and account to the defendants for the proceeds; and this having been so held at the sittings, a rule for a new trial was refused.¹ And on the analogous cases of warranties and sureties, it seems very rightly decided.**

AGENT AGAINST PRINCIPAL.

§ 834. **Indemnity for loss or expense.**—The agent's claim for compensation for services performed has been discussed in a former chapter. But he is entitled also to reimbursement for any loss or expense to which he is subjected. * If an agent, without default, incurs losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor.(*) So an agent has been allowed to recover the damages paid by him on a protested bill drawn for his principal's bene-

¹ *Vide Russell on Factors and Brokers*, 257.

(*) *Yeatman v. Corder*, 38 Mo. 337; *Feeter v. Heath*, 11 Wend. 477; *Howe v. Buffalo, N. Y. & Erie R.R. Co.*, 37 N. Y. 297; *Elliott v. Walker*, 1 Rawle 126.

fit.^(*) So an agent, who was indemnified against the commission of an act which was not known at the time to be a trespass, but which proved to be such, was allowed to recover against his principal the amount of the judgment recovered against himself,^(b) with costs and counsel fees.^(c) And it is quite immaterial in these cases, whether the agent have a promise to indemnify him or not; the law implies an agreement on the part of the principal to save him harmless.^(d)

Where merchants here gave a written engagement to their agent at the Havana, to save them harmless from all costs, damages, and expenses which might arise in consequence of any lawsuit which then was or might be brought against them for the recovery of freight or average on the cargo of a certain ship, it was held that the agents were entitled to recover for money which they were obliged to pay in consequence of legal proceedings on an award made previous to obtaining the written engagement.^{1**} Where the plaintiffs, who were brokers, having been ordered to buy stock, did so, paid for it, taking the certificate in their own name, offered to transfer it, and demanded of their principal payment, which he did not make, and the stock declined in value, it was held that they could recover the price paid by them, and not merely the difference between that price and the market value on the day of their demand.^(*) An attorney to

¹ Hill v. Packard, 5 Wend. 375.

(*) Riggs v. Lindsay, 7 Cr. 500; Ramsay v. Gardner, 11 Johns. 439.

(b) Pool v. Adkisson, 1 Dana 110, 115; Drummond v. Humphreys, 39 Me. 347; Coventry v. Barton, 17 Johns. 142.

(c) Adamson v. Jarvis, 4 Bing. 66.

(d) Warlow v. Harrison, 1 E. & E. 309; Stocking v. Sage, 1 Conn. 519; Powell v. Trustees of Newburgh, 19 Johns. 284; Castle v. Noyes, 14 N. Y. 329, 332; D'Arcy v. Lyle, 5 Binn. 441.

(*) Giddings v. Sears, 103 Mass. 311.

collect a claim who has paid out money for the costs and expenses of bringing suit on the claim is entitled to be reimbursed.^(*)

Where an agent contracted in his own name within his authority for the principal's benefit, and the principal failed to carry out the contract, the agent having paid damages for the breach was only allowed to recover against his principal the actual amount of the third party's damage and not the amount paid, as he should have given the principal opportunity to defend.^(b) So, on the other hand, where the principal refuses to defend a suit brought against his agent, if the agent's course in defending it is a prudent and reasonable one, the principal will be liable to him for the costs thus sustained.^(c)

* It has been said that if an agent abroad, as for example, a foreign factor, should, at his own risk and peril, evade the payment of foreign customs and duties, he would still be entitled to charge them against his principal, as if they had been actually paid. But the lively moral sense of Mr. Justice Story is shocked at this idea; and he justly says, that it may well be doubted whether this doctrine is sound or maintainable.¹ ** And it has been held that where an agent was instructed to insure and did not do so, he could not recover the amount of the premiums of his principal although he had subjected himself to the risk of loss.^(d)

¹ Story on Agency, § 343, and authorities there cited.

(*) *Howe v. Wade*, 4 McLean 319; *Bruce v. Baxter*, 7 Lea 477, 487.

(b) *Saveland v. Green*, 36 Wis. 612. In *Clark v. Jones*, 16 Lea 351, though there was no evidence that the principal had been notified to defend the suit, the agent was held to be entitled to recover his attorney's fees.

(c) *Brom v. Hall*, 7 C. B. (N. S.) 503; *Yeatman v. Corder*, 38 Mo. 337.

(d) *Storer v. Eaton*, 50 Me. 219.

THIRD PARTY AGAINST AGENT.

§ 835. *Liability for acting without authority.*—One who falsely holds himself out to another as an agent is liable for any loss that happens by reason of his lack of authority. In a case in England the defendant falsely represented himself as authorized to sell certain land, and entered into a contract with the plaintiff, on behalf of the owners, to sell the land for a certain sum. The owners repudiated the contract, and conveyed the land at an advanced price to another. The plaintiff filed a bill against the owners for specific performance, but before a hearing the owners and the present defendant swore, in answer to interrogatories, that the defendant was not authorized to make the contract. Having failed in his suit for specific performance, the plaintiff brought action against the defendant. It was held that he could recover, first, the expense of investigating the title; second, the expenses of his suit against the owners, until their testimony made it unreasonable for him to continue the suit; third, damages for the loss of his bargain, that is, the difference between the contract price and the market price of the land. The price for which the land was conveyed would be evidence of the market price.^(*) An attorney-at-law executed to a deputy sheriff, in the name of the plaintiffs, in sundry writs, the following agreement: "Know all men by these presents, that we agree to hold harmless A. B., sheriff, for selling stoves and iron on the executions in his hands at this time, to wit, one in *Knight v. Cheshire Iron Works*; the other, *Dooley v. Same*, and from all costs, charges, damages, and expenses whatsoever, that may result or accrue to him for attaching or selling Cheshire Iron Works' prop-

(*) *Godwin v. Francis*, L. R. 5 C. P. 295.

erty, or property claimed or which belongs or belonged to Cheshire Iron Works." In an action by the deputy sheriff against the attorney for falsely representing that he had authority so to execute it, it was held that the jury might consider on the question of damages a judgment recovered against and paid by the plaintiff for taking and selling the property mentioned in the agreement, deducting therefrom so much as consisted of damages resulting from attachments made by the plaintiff after the making of the contract, or, if that amount could not be ascertained, the rule of damages might be the amount of the judgments in favor of the parties whose names had been signed by the defendant to the contract, and which had been satisfied by the application thereon of the avails of the sale of the property so taken by the plaintiff. The plaintiff was, moreover, entitled to recover the costs and expenses of sundry litigations directly necessitated by the fraud, and proper compensation for his own time and services in the matter, besides interest on his expenses up to the verdict.^(*)

The plaintiff being in occupation of a house and shop, as assignee of a term which would expire in March, 1867, at a yearly rent of £65, the defendant, who had for several years acted as agent of the freeholder in collecting the rents of the property, agreed, in writing, November 16th, 1863, on behalf of the freeholder, to grant the plaintiff, at the expiration of the existing term, a renewed lease of twenty-one years at a rent of £70, the plaintiff agreeing to put in a new shop front at her expense. The plaintiff put in the new front at an expense of £50, and expended £10 more in permanently improving the premises, and in June, 1865, agreed with one Budd to sell him her interest in the existing and future leases at a

(*) Jones v. Wolcott, 2 All. 247.

premium of £150. The defendant had no authority from the freeholder (his brother) to make the agreement, and the latter refused to ratify it. The plaintiff, who had no notice of the defendant's want of authority, thereupon, in conjunction with Budd, filed a bill against the defendant's brother for a specific performance, and this was dismissed with costs. Budd then sued the plaintiff on her contract with him, and recovered damages to the amount of £280, as follows: £205 assessed by the arbitrator as the value of the lease; £22 10s. for the loss incurred by Budd on the resale of the fixtures, which he had bought upon the premises; £35 for loss of business by removal; £17 for solicitor's charges. These damages, together with the costs of the action and reference, were paid by the plaintiff. It was held, that the plaintiff was entitled to recover against the defendant all the costs paid and incurred by her in the chancery suit, and also the value of the lease which she had lost through the non-performance of the agreement of 16th November, 1863 (assumed to be £205), but not the damages and costs which arose out of the resale of the lease to Budd; these not having necessarily resulted from the defendant's wrongful act were consequently too remote.^(a)

§ 836. *Loss of bargain.*—The plaintiff may, as has been seen, recover what he would have gained by the contract.^(b) If the contract was to pay money simply, he may recover the amount to be paid.^(c) In an English case, the defendants, warranting themselves as agents of

^(a) *Spedding v. Nevell*, L. R. 4 C. P. 212.

^(b) *In re National Coffee Palace Co.*, 24 Ch. D. 367; *Firbank v. Humphreys*, 18 Q. B. Div. 54; *Godwin v. Francis*, L. R. 5 C. P. 295; *Maxwell v. Parnell*, Ir. Rep. 1 C. L. 234; *Jones v. Wolcott*, 2 All. 247; *Skaaraas v. Finnegan*, 31 Minn. 48.

^(c) *Meek v. Wendt*, 21 Q. B. D. 126; *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Palmer v. Stephens*, 1 Den. 471; *Hampton v. Speckenagle*, 9 S. & R. 212.

Lloyd & Co., contracted for the sale to the plaintiffs by Lloyd & Co., of certain cargoes of American wool which were soon to arrive. Lloyd & Co. having repudiated the contract, which they had not sanctioned, the plaintiff filed a bill in equity against them for specific performance, which was dismissed with costs. In the action on the warranty, the Court of Queen's Bench held that the damages should include the difference between the contract price of the wool and the value of like wool at the time and place where the cargoes would have been delivered, had the contract been binding, taking into account all the mercantile circumstances affecting the value, and including the taxed costs of the chancery suit and the plaintiff's costs, taxed as between attorney and client.^(a) So in a like case in the Court of Queen's Bench, Mr. Justice Crompton remarked: "The damages to be recovered are what was lost to the plaintiff by not having the valid contract, which the agent warranted he had." And a verdict for the difference between the price named in a contract made without authority and repudiated by the alleged principal and that obtained on a resale fairly made, was held right.^(b)

§ 837. *Expense of litigation.*—If the plaintiff brings suit against the supposed principal, having no reason to doubt the authority of the unauthorized agent, he may recover from the latter his costs and expenses in his suit against the principal.^(c) But in order to recover the plaintiff must have acted reasonably in bringing or continuing

(a) *Hughes v. Graeme*, 33 L. J. (N. S.) Q. B. 335.

(b) *Simons v. Patchett*, 7 E. & B. 568, 574.

(c) *Polhill v. Walter*, 3 B. & A. 114; *Randell v. Trimen*, 18 C. B. 786; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Godwin v. Francis*, L. R. 5 C. P. 295; *Jones v. Wolcott*, 2 All. 247; *Wright v. Baldwin*, 51 Mo. 269; *White v. Madison*, 26 N. Y. 117; *Eckstein v. Whitehead*, 10 Up. Can. C. P. 65.

the former suit.^(*) So, where one Davis, professing in good faith to have authority to let certain premises, but having no authority in fact, made a parol lease of them for seven years, and the lessee was dispossessed by the owners, in an action of ejectment which he defended, relying on the authority of Davis and on his own attorney's advice, it was, in an action by the lessee against the professed agent, held by the Court of Queen's Bench, that he could recover the expense of certain repairs he had put on the premises, but not of the defense of the ejectment suit, since that could not have been defended, if the agent had possessed authority, the parol lease being void. The attorney's bad advice did not make the defendant liable.^(b)

§ 838. **Incidental expenses.**—The plaintiff may recover expenses which flow naturally from the contract. So where the pretended agent let the plaintiff into possession under a lease, he may recover the expense of repairs.^(c) If an auctioneer sell real property without sufficient authority, so that the purchaser cannot get a title, the auctioneer will be liable to pay the purchaser's expenses of investigating the title, with interest on the deposit, and also interest on the purchase-money, if it have been in readiness and unproductive.^(d) But it has been held that the plaintiff cannot recover for a loss upon bank shares which he sold to obtain the purchase-money,^(e) nor for loss in the purchase of horses to carry on the farm which

(*) *Godwin v. Francis*, L. R. 5 C. P. 295.

(b) *Pow v. Davis*, 1 B. & S. 220.

(c) *Pow v. Davis*, 1 B. & S. 220; *Spedding v. Nevell*, L. R. 4 C. P. 212.

(d) *Bratt v. Ellis*, C. B. M. & H. Terms, 45 Geo. III; *Sugden on Vendors*, 812, 14th ed.; *Jones v. Dyke*, Cor. Macdonald, C. B.; *Ibid.* 813; *Godwin v. Francis*, L. R. 5 C. P. 295.

(e) *Maxwell v. Parnell*, Ir. Rep. 1 C. L. 234.

he had contracted to buy,^(*) for these losses are too remote.

§ 839. **Unauthorized suits.**—Where a party brings an action in the name of another without his direction or consent, he is acting as an unauthorized agent, and is liable to make good to the party sued the damage sustained.^(b) The gist of the action is want of authority; but evidence of express malice on the part of the defendant toward the plaintiff is competent.^(c) In *Bond v. Chapin* ^(d) Hubbard, J., said :

“ If the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damages sustained by him, in the loss of time, and for money paid to procure the discontinuance of the suit, but nothing more. Where, however, in addition to a want of authority, the suit commenced was altogether groundless, and was prosecuted with malicious motives, . . . then, in addition to the actual loss of time and money, the party may recover damages for the injury inflicted on his feelings and reputation.”

^(*) *Godwin v. Francis*, L. R. 5 C. P. 295.

^(b) *Foster v. Dow*, 29 Me. 442; *Bond v. Chapin*, 8 Met. 31; *Streeper v. Ferris*, 64 Tex. 12.

^(c) *Smith v. Hyndman*, 10 Cush. 554.

^(d) 8 Met. 31, 33.

CHAPTER XXVIII.

THE MEASURE OF DAMAGES IN ACTIONS BY AND AGAINST CARRIERS.

I.—CARRIERS OF GOODS.

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| <p>§ 840. The law measures the damages.</p> <p>841. Compensation of carrier.</p> <p>842. Refusal to transport.</p> <p>843. Consequential damages.</p> <p>844. Non-delivery.</p> <p>845. Value, where to be estimated.</p> <p>846. Connecting lines.</p> <p>847. Value, when to be estimated.</p> <p>848. Reduction of damages—Acceptance of goods.</p> | <p>§ 849. Insurance money.</p> <p>850. Consequential damages.</p> <p>851. Limited liability.</p> <p>852. Injury during transportation.</p> <p>853. Misdelivery.</p> <p>854. Delay in delivery.</p> <p>855. Delay in transportation by sea.</p> <p>856. Consequential damages.</p> <p>857. Delay in unloading a vessel.</p> <p>858. Agreement to furnish freight.</p> |
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II.—CARRIERS OF PASSENGERS.

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| <p>§ 859. Form of action.</p> <p>860. Personal injury.</p> <p>861. Nervous shock.</p> <p>862. Failure to carry a passenger.</p> <p>863. Delay in transporting a passenger.</p> <p>864. Failure to carry to destination.</p> <p>865. Indignity of expulsion.</p> <p>866. Compensation for the risk of injury.</p> | <p>§ 867. Consequences of exposure.</p> <p>868. American rule.</p> <p>869. Pullman Palace Car Co. v. Barker.</p> <p>870. Brown v. Chicago, M. & S. P. Ry. Co.</p> <p>871. General conclusions.</p> <p>872. Avoidable consequences.</p> <p>873. Baggage.</p> |
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CARRIERS OF GOODS.

§ 840. The law measures the damages.—* The class of cases which we now proceed to consider, like those discussed in the last chapter, cannot be made to conform to the broad line that separates contract from tort; as the actions against common carriers may be framed either *ex contractu* upon the breach of the engagement, or *ex*

delicto upon the violation of the public duty. But we shall find that, whether the action be on the contract, or on the violation of duty, the measure of damages is equally a question of law, and as much under the control of the court as if the right rested in agreement merely.**

§ 841. **Compensation of carrier.**—The carrier is entitled to compensation for transporting the goods. If no rate of freight is fixed by contract, he may recover a reasonable compensation.^(*) If the owner and the carrier agree that the goods shall be taken by the owner before reaching their destination, the carrier is entitled to compensation *pro rata itineris*.^(b) The facts must be such, however, as to raise a fair inference that the further carriage of the goods was intentionally dispensed with. If the goods were accepted from necessity to save their destruction, or because of breach of contract by the carrier, there can be no recovery.^(c)

§ 842. **Refusal to transport.**—If a carrier wrongfully refuses to transport goods, the difference between the value of the goods at the place of shipment and at the place of delivery when they should have arrived furnishes the measure of damages, deducting the freight or price of carriage.^(d) * If, however, another conveyance can be

(*) *Bastard v. Bastard*, 2 Show. 82; *Simmes v. Marine I. Co.*, 2 D. C. (2 Cr. C. C.) 618.

(b) *Luke v. Lyde*, 2 Burr. 882; *The Mohawk*, 8 Wall. 153; *Hunt v. Haskell*, 24 Me. 339; *Rossiter v. Chester*, 1 Doug. (Mich.) 154; *Bennett v. Byram*, 38 Miss. 17; *Harris v. Rand*, 4 N. H. 259, 261 (*semble*); *Whitney v. New York F. I. Co.*, 18 Johns. 208; *Parsons v. Hardy*, 14 Wend. 215; *Gray v. Waln*, 2 S. & R. 229; *Hooe v. Mason*, 1 Wash. (Va.) 207.

(c) *Liddard v. Lopes*, 10 East 526; *Vlierboom v. Chapman*, 13 M. & W. 230; *Caze v. Baltimore Ins. Co.*, 7 Cranch 358; *Western Transportation Co. v. Hoyt*, 69 N. Y. 230.

(d) *Galena & C. U. R.R. Co. v. Rae*, 18 Ill. 488; *Bridgman v. The Emily*, 18 Ia. 509; *Harvey v. Connecticut & P. R. R.R. Co.*, 124 Mass. 421; *Ward's C. & P. L. Co. v. Elkins*, 34 Mich. 439; *People v. New York, L. E. & W.*

found by using ordinary care, the plaintiff is bound to do so; and in such case the measure of damages will be merely the difference between the freight or price of carriage agreed on with the defendant and the sum (if greater) which the plaintiff has been obliged to pay others.** If the goods are finally transported by the carrier, the measure of damages is the deterioration in value of the goods caused by the delay, (*) as in the case, hereafter considered, of delay in delivery.

* The plaintiff brought action to recover damages of the defendant for refusing to transport wheat from Pittsburg to Philadelphia, according to contract: the transportation was prevented by the approaching freezing of the canal. The defendant contended that the measure of damages was the difference between the price agreed on for the freight, and that for which their carriage might have been obtained by others; and the court said that this would be the rule, if the plaintiff *could* have obtained other conveyance.¹ "The plaintiff would have no right, by his own negligence or want of care, to incur a voluntary loss for the purpose of imposing it on the defendant as a penalty for the breach of contract. If, as is usually the case here, another conveyance could have been obtained for this wheat before the canal froze up, by a little extra expense and the delay of a day or two, he would have no right to claim greater damages than would have been incurred by such extra expenses and delay." But the defendant offering no such proof the true rule of

¹ O'Conner v. Forster, 10 Watts 418.

R.R. Co., 22 Hun 533; Fox v. Hayward, 4 Brewster 32; McGovern v. Lewis, 56 Pa. 231; Pennsylvania R.R. Co. v. Titusville & P. P. R. Co., 71 Pa. 350.

(*) Chicago & A. R.R. Co. v. Erickson, 91 Ill. 613; Texas P. Ry. Co. v. Nicholson, 61 Tex. 491.

damages was held to be the difference between the value of the wheat in Pittsburg, with the freight added, and the market price at Philadelphia, at the time it would have arrived there if carried according to the contract.**

* So where the contract was to take on board a vessel a cargo of wheat at a certain freight, and it was proved that the defendant refused to receive the wheat, and that the price of freight rose three pence per bushel between the date of the agreement and the sailing of the vessel, it was held that the difference between the price agreed upon for transporting the wheat, and that for which its carriage might have been obtained by others at the time when the ship was to receive it, was the true measure of damages.(*) It was insisted that the shipper was bound to show affirmatively, that he had a cargo of the kind agreed on, ready for shipment at the time fixed by the contract, or that he could only recover nominal damages; but it was decided that this was not necessary.¹** So where the carrier failed to have a ship at a foreign port ready to receive goods there, the measure of the damages recoverable against him was held to be the difference between the contract price and the market rate of freight at that

¹ *Odgen v. Marshall*, 8 N. Y. 340.

(*) *Acc. Nelson v. Plimpton F. P. E. Co.*, 55 N. Y. 480; *Grund v. Pendergast*, 58 Barb. 216. On the other hand, in *Bohn v. Cleaver*, 25 La. Ann. 419, the defendants agreed with the plaintiffs to give them a steamer for a full cargo of cotton to Liverpool or Havre, at a stipulated rate, the ship to be ready on the 15th of October. The ship was not ready on the 15th. On that day freights to Liverpool were one penny and one-eighth sterling per pound, an advance on the agreed price. There was no evidence to show that the plaintiff had made any contracts to ship cotton. He testified that he did not like to take the risk of making contracts, because he was afraid the vessel could not arrive in time. It was held that the plaintiff could not recover; that the damages were too speculative. Two judges dissented, holding that the measure of damages was the profit which would have arisen on a full cargo from the difference between the contract and the ruling rate.

port for the voyage, with interest from the time when the freight would have been payable if the contract had been kept.^(*)

Where the defendants agreed at a fixed price to convey six vessel loads of lumber from Saginaw to Chicago—one in August, two in September, two in October, and one in November, and carried five only—one in August, one in September, one in October, and two in November—and freight rose in October and largely in November, and there was no evidence of any agreement of the parties to apply the extra cargo to the default in September or October, it was held that the defendants had a right to have the extra cargo carried in November, and which had been accepted by the plaintiffs, stand as a substituted performance for the cargo they had failed to carry in October, and that the plaintiffs would be entitled to such damages only as they had sustained by the defendants' failure to carry one of the September cargoes.^(b)

§ 843. **Consequential damages.**—The master of a vessel having contracted for the transportation of a cargo, the performance of the contract was interrupted while the lading of the cargo on board was going on, by the death of the master, and afterwards by the freezing up of the vessel. The owner repudiated the contract, and refused either to take on board the residue of the cargo, or to deliver up that already laden. It was held, First : That the shipper could recover damages for the value of the brick laden on board and withheld ; for the cost of transporting the residue from his storehouse to the dock ; for any injuries received by them while they lay there awaiting acceptance by the owner of the vessel ; and for the difference in the

(*) *Higginson v. Weld*, 14 Gray 165.

(b) *Lord v. Strong*, 6 Mich. 61.

shipper's disfavor, if any, between the contract price of transportation, and his actual expenses incurred in obtaining another mode of conveyance. Second: That he could not recover against the vessel for injuries received by the property after notice of the owner's refusal to complete the contract, but that the vessel was chargeable with the cost of transporting the portion of cargo left behind, to its place of destination.^(*) Where the defendants, having contracted to be ready with their ship on the river Tyne on a certain day, to receive a cargo of coal to be carried to Havre for the plaintiff, broke their contract, and the plaintiff had, in consequence, not only to charter vessels at an advanced freight, but also to buy coal at a higher price, he was held entitled, in the absence of proof that there had been an equivalent rise in coal at Havre, to recover for the loss on the coal, as well as on the freight.^(b)

Where the carrier had notice of a contract of sale for the goods at the place of delivery, the owner may recover the difference between the contract price and the market price at the place of shipment, less freight.^(c) Where the carrier had notice that the failure to transport goods would result in a delay in work which was being carried on by the plaintiff, it was held that the latter might recover the expenses caused by stoppage of the work, and the wages lost.^(d)

The defendant agreed to transport lumber to Boston, for the plaintiff, at certain rates, for a certain time. The defendant failed to perform the contract and the lumber was not shipped. In the court below the plaintiff was

(*) *The Flash*, 1 Abb. Adm. 119.

(b) *Featherston v. Wilkinson*, L. R. 8 Ex. 122.

(c) *Cobb v. Illinois C. R.R. Co.*, 38 Ia. 601, 630.

(d) *Pennsylvania R.R. Co. v. Titusville & P. P. R. Co.*, 71 Pa. 350.

allowed to recover damages for losses on contracts of which the defendant had no notice. On appeal this was held to be error, and that, as the property had not been shipped, the true measure of damages was the difference between the market prices at Boston and at the place of shipment at the time when the defendant should have transported the lumber, less the freight stipulated in the contract of transportation.^(*) But in an action for failure to receive and carry corn according to agreement, a shipper can recover for loss of profits which he would have derived out of a sub-contract where he notified the company of the sub-contract on entering into his contract with them. In such an action the measure of damages is the difference between the market price at the place where the corn was offered for transportation, and the contract price less the cost of transportation.^(b)

Where a railway company refused to carry, at the ordinary rate, packed parcels for a carrier, whereby he was forced to send them by a circuitous route at a greater expense, he was held not entitled to recover for loss of business alleged to have been sustained in consequence.^(c) But where carriers unreasonably made a restriction under which they refused to receive less than 15 loads of coal, and the plaintiffs were thereby prevented from sending a less number of loads which they had on hand, it was held that the plaintiff could recover for loss of custom by not being able to send that coal.^(d) Where the defendants refused to transport grain, which heated before another carrier could be found, the owner was allowed to recover the loss by the heating of the

(*) *Harvey v. Connecticut & P. R. R.R. Co.*, 124 Mass. 421.

(b) *Cobb v. Illinois C. R.R. Co.*, 38 Ia. 601.

(c) *Crouch v. Great Northern Ry. Co.*, 11 Ex. 742.

(d) *Lancashire & Y. Ry. Co. v. Gidlow*, L. R. 7 H. L. 517.

grain.^(*) In an Irish case it appeared that the carrier failed to provide cars to transmit the plaintiff's valuable horses to market. The horses were thereupon sent on foot to market. They had been fed "soft," in consequence of which they arrived at market in a damaged condition; if they had been in ordinary condition little damage would have resulted from the journey. It was held that under the rule in *Hadley v. Baxendale*, no damages could be recovered for the consequences which ensued from the horses being "soft fed." The measure of damages was the deterioration in value that horses able to make the journey would have suffered, and the time and labor upon the road;^(b) from which, of course, must be subtracted the freight plaintiff must have paid the carrier.

§ 844. *Non-delivery—Value at place of destination, with interest, the general rule.*—As a general rule, where goods are entrusted to a carrier, and they are not delivered according to the contract, the measure of damages is the value of the goods at the place of destination in the condition in which the carrier undertook to deliver them, at the time when they should have been delivered, less the proper charges of transportation and delivery, if these have not been paid.^(c)

(*) *Pittsburgh, C. & St. L. Ry. Co. v. Morton*, 61 Ind. 539 (*semble*).

(b) *Waller v. Midland G. W. Ry. Co.*, 4 L. R. Ir. 376.

(c) *Sanquer v. London & S. W. Ry. Co.*, 16 C. B. 163; *Rodoconachi v. Milburn*, 17 Q. B. D. 316; 18 Q. B. Div. 67; *The Patrick Henry*, 1 Ben. 292; *The Gold Hunter*, 1 Blatch & H. 300; *Arthur v. The Cassius*, 2 Story 81; *Bazin v. Steamship Co.*, 3 Wall. jr. 229; *The Nith*, 36 Fed. Rep. 86; *South & N. A. R.R. Co. v. Wood*, 72 Ala. 451; *St. Louis, I. M. & S. Ry. Co. v. Mudford*, 44 Ark. 439 (*semble*); *Ringgold v. Haven*, 1 Cal. 108; *Hart v. Spalding*, 1 Cal. 213; *Taylor v. Collier*, 26 Ga. 122; *Wilson v. Atlanta & C. Ry. Co.*, 82 Ga. 386; *Sangamon & M. R.R. Co. v. Henry*, 14 Ill. 156; *Chicago & N. W. Ry. Co. v. Dickinson*, 74 Ill. 249; *Michigan S. & N. I. R.R. Co. v. Caster*, 13 Ind. 164; *The Emily v. Carney*, 5 Kas. 645; *Segura v.*

In an action of *assumpsit*¹ against the defendants, as shipowners, for not delivering a cargo of wheat consigned to the plaintiffs, the cargo reached the port of discharge, but was not delivered, and the price of the cargo at the time it reached its port of destination was held to be the true rule of damages. "As between the parties in this cause," said Parke, J., "the plaintiffs are entitled to be put in the same situation as they would have been if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by non-performance of the defendant's con-

¹ *Brandt v. Bowlby*, 2 B. & A. 932.

Reed, 3 La. Ann. 695; Price *v.* The Uriel, 10 La. Ann. 413; Nourse *v.* Snow, 6 Me. 208; Spring *v.* Haskell, 4 All. 112; Green *v.* B. & L. R.R. Co., 128 Mass. 221 (*semble*); Marquette, H. & O. R.R. Co. *v.* Langton, 32 Mich. 251; Atkisson *v.* The Castle Garden, 28 Mo. 124; Union R.R. & T. Co. *v.* Traube, 59 Mo. 355; Gray *v.* Missouri R. P. Co., 64 Mo. 47; Dunn *v.* Hannibal & St. J. R.R. Co., 68 Mo. 268; Rice *v.* Indianapolis & St. L. R.R. Co., 3 Mo. App. 27; Bailey *v.* Shaw, 24 N. H. 297; Smith *v.* Richardson, 3 Cai. 219; Watkinson *v.* Laughton, 8 Johns. 213; Elliott *v.* Rossell, 10 Johns. 1; Amory *v.* M'Gregor, 15 Johns. 24; Sturgess *v.* Bissell, 46 N. Y. 462; Sherman *v.* Wells, 28 Barb. 403; Van Winkle *v.* United States M. S. Co., 37 Barb. 122; Krohn *v.* Oechs, 48 Barb. 127; McGregor *v.* Kilgore, 6 Ohio 358; Louis *v.* The Buckeye, 1 Handy 150; Prettyman *v.* Oregon Ry. & N. Co., 13 Ore. 341 (*semble*); Hand *v.* Baynes, 4 Whart. 204; Ludwig *v.* Meyre, 5 W. & S. 435; Warden *v.* Greer, 6 Watts 424; Gillingham *v.* Dempsey, 12 S. & R. 183; Shaw *v.* South Carolina R.R. Co., 5 Rich. L. 462; O'Neill *v.* South Carolina R.R. Co., 9 Rich. L. 465; Wallingford *v.* Columbia & G. R.R. Co., 26 S. C. 258; Edminson *v.* Baxter, 4 Hayw. 112; Dean *v.* Vaccaro, 2 Head 488; Louisville & N. R.R. Co. *v.* Mason, 11 Lea 116; Wolfe *v.* Lacy, 30 Tex. 349; International & G. N. Ry. Co. *v.* Nicholson, 61 Tex. 550; Laurent *v.* Vaughn, 30 Vt. 90; Blumenthal *v.* Brainerd, 38 Vt. 402 (*semble*); Chapman *v.* Chicago & N. W. Ry. Co., 26 Wis. 295; Whitney *v.* Chicago & N. W. Ry. Co., 27 Wis. 327; Worden *v.* Canadian P. Ry. Co., 13 Ont. 652. In a few cases where goods on board ship were lost, the measure of damages was held to be the invoice price, with interest: The Vaughan & Telegraph, 14 Wall. 258; Jackson *v.* The Julia Smith, Newb. Adm. 61; Wheelwright *v.* Beers, 2 Hall 391. See §§ 845, 855.

tract." So in another case,¹ where suit was brought on an agreement to carry a quantity of salt from Oswego to Queenston, the difference in value of the article at Oswego and at Queenston at the time, was held the true rule of damages. In a case on the Massachusetts circuit,² where a libel was filed in admiralty, against vessel and master for not delivering a cargo at Velasco, the vessel arrived out, and the consignee refusing to receive it, the master, contrary to his duty, carried it on to New Orleans. It was held that the libellants were entitled to recover the actual value at Velasco at the time when the cargo should have been landed there, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed.

In Massachusetts, it was agreed by bill of lading, that the net proceeds of the cargo at the port of destination should be paid to the shippers in ninety days after the return of the vessel to her home port; the ship having arrived out, the goods were sold, and the proceeds invested by the owners of the ship on their own account, in return cargo; the ship met with disaster and injured her cargo 50 per cent., but arrived at her home port; and it was held that the shippers were entitled to recover the whole net amount for which the adventure was sold in the foreign port.³ A carrier who receives goods from a wrong-doer, without the consent of the owner, expressed or implied, can have no right to detain them against the true owner for the payment of his freight. But when the freight is earned in good faith, under a contract of transportation made with an agent of the owner, who,

¹ Bracket v. M'Nair, 14 Johns. 170.

² Arthur v. The Cassius, 2 Story 81: and Mr. Justice Story said, that the rule adopted in prize cases, of an addition of ten per cent. to the price cost of the cargo, did not apply to cases like the present; that rule ordinarily supposing

that the vessel has been captured before she arrived at the port of destination, and the court making the presumption of the additional value of ten per cent. in *odium spoliatoris*.

³ Wallis v. Cook, 10 Mass. 510; Winchester v. Patterson, 17 Mass. 62.

according to the usages of the business, is clothed with apparent authority by his principal, then the charges for freight will constitute a valid lien on the property, although the agent, by an accidental or intentional departure from his instructions, sends the goods by a route not intended, or to the wrong place.^(*) And so in an action by the owner of goods against a third person to whom they had been sent by mistake, and who had paid the freight on them in good faith, he was held entitled to a deduction of the amount of the freight, as he succeeded to the right of the carrier. Where goods were lost through the negligence of a carrier on the last part of the route, the plaintiff was allowed to recover the value at the place of destination, less the freight. It was held that he could not recover, in addition, the freight paid to another railroad company which carried the goods over the first part of the route.^(b) It may, however, be the case that the non-delivery of the goods does not cause a loss to the plaintiff equal to the full value of the goods. This was held to be the case where a carrier allowed the plaintiff's slave to escape. Since the plaintiff might recapture the slave, the measure of damages was not necessarily the full value.^(c)

§ 845. *Value, where to be estimated.*—As we have said, the general rule is that the value at the place of destination governs. A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own

(*) *Whitney v. Beckford*, 105 Mass. 267.

(b) *Northern Transportation Co. v. McClary*, 66 Ill. 233.

(c) *O'Neill v. South Carolina R.R. Co.*, 9 Rich. L. 465.

authority, at auction ; after which the vessel sailed, and in due time arrived at the port of delivery. *Held*, 1. That the owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and interest on the balance. 2. That the value of the cargo should be computed by the market price at the port of delivery, at the time of the arrival of the vessel, it appearing that, except for the accident, the cargo would at that time, in the ordinary course of things, have been delivered ; with a privilege, however, to the owner to claim the amount realized upon the sale of the goods at auction.^(*)

§ 846. *Connecting lines*.—It is now generally the law in the United States, although it is not so in England, that the receipt by a carrier of goods destined to a place beyond the terminus of his route, does not in itself imply a contract on his part to carry them beyond such terminus.^(b) In such a case the destination of the goods, as regards the carrier on one of the several routes over which they are transported, is the terminus of his partic-

(*) *The Joshua Barker*, 1 Abb. Adm. 215. In some jurisdictions in case of a sea voyage a different rule prevails. . In such a case in New York, after reviewing the cases, it was held that the measure of damages was their value at that port, not their value at the port of destination, less the cost of transportation. *Krohn v. Oechs*, 48 Barb. 127 ; *Lakeman v. Grinnell*, 5 Bosw. 625. In a case decided by Mr. Justice Story in 1844, where a box of gold coin had been shipped from New York to be carried to Mobile, and the ship was wrecked off the coast of Florida, and most of the cargo saved and taken to Key West, where salvage proceedings were instituted, but the coin was lost through the master's gross neglect, the measure of damages was held to be its value at Key West, with interest from the time when the salvage proceedings were taken. *King v. Shepherd*, 3 Story 349.

(b) *Railroad Co. v. Pratt*, 22 Wall. 123 ; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594 ; *Elmore v. Naugatuck R.R. Co.*, 23 Conn. 457 ; *Naugatuck R.R. Co. v. Waterbury Button Co.*, 24 Conn. 468 ; *Hempstead v. New York C. R.R. Co.*, 28 Barb. 485 ; *Dillon v. New York & E. R.R. Co.*, 1 Hilt. 231.

ular route ; and their value at that point, and not at their ultimate place of consignment, has been held to define his responsibility.^(*) But circumstances may modify this rule, and in fixing the amount of damages reference may be had to the ultimate destination intended for the goods. Thus where apples intended for the New York market, which destination was known to the carrier, were to be transported by the New York Central Railroad to the intermediate town of Albany, which was the terminus of the railroad, and there delivered to another carrier to be conveyed to New York, Albany was held to be the port of destination as regarded the railroad company, and the value there furnished the rule of damages in an action against it for injury to the apples by freezing while in its charge. But proof of their value in New York was held admissible, the court considering that the value in that city, deducting the freight thither from Albany, would be proper evidence of the value at Albany.^(b) Where, however, a carrier enters into a special contract to deliver goods beyond his own route, he will be liable for the value at the ultimate point of destination.^(c) In *Erie Ry. Co. v. Lockwood*^(d) the defendant had agreed to carry to Jersey City and forward from there to Boston. It was held proper for the judge at *nisi prius* to refuse to charge in such a case that the defendant was only liable for the value of the oil at the terminus of its line where it was to be delivered to the next carrier, the plaintiff being entitled to the benefit of through rates.

(*) *Louis v. The Buckeye*, 1 Handy 150.

(b) *Marshall v. New York C. R.R. Co.*, 45 Barb. 502.

(c) *Perkins v. Portland, S. & P. R.R. Co.*, 47 Me. 573. In *Indiana*, however, the point is left undecided. *Michigan S. & N. I. R.R. Co. v. Caster*, 13 Ind. 164.

(d) 28 Oh. St. 358. The report of this case is not very clear.

§ 847. Value, when to be estimated.—* In New York,¹ where case was brought against a carrier for delay in forwarding Alpine mulberry-trees, in consequence of which a portion were destroyed, the plaintiff claimed as his damages the market value of the trees—four shillings each. The defendant's counsel offered to prove that, from subsequent experiments, this kind of tree had been ascertained to be of no intrinsic value; that the value put on them when the injury occurred was factitious; and that if as much had been known of them then as at the time of trial, they could have been bought for one cent each. He further offered to prove that Alpine mulberry-trees were not worth cultivating for the purpose of raising silk-worms; that those in question were purchased by the plaintiff with a view of growing seedlings for sale, and that they were of no value for that purpose the next year after they were bought. These offers were overruled, and (notwithstanding the dissenting opinion of Cowen, J.) the Supreme Court held rightly. Nelson, J., in delivering the opinion of the court, said :

“The damages should afford the plaintiff an adequate indemnity for the loss sustained at the *time the injury happened*. Assuming that there is no defect in the quality of the article, the fair test of its *value*, and consequently of the loss to the owner, is the price at *the time in the market*. The objection to the evidence offered is, that it proposes to take into consideration the fluctuations of the market value long *subsequent to the time* when the injury happened, thereby making the measure of damage to depend on the accidental fall of prices at some future period, which might or might not occur, and if it did, the loss might or might not have fallen on the plaintiff, as for aught the court or jury could know, he may have parted with the property before its depreciation.” **

¹ Smith v. Griffith, 3 Hill 333; acc. Kent v. Hudson R. R.R. Co., 22 Barb. 278.

Where it becomes illegal either to deliver or return the goods, on account of the existence of war, the measure of damages is the value of the goods at the time of a demand for them at the end of the war.^(*)

§ 848. Reduction of damages—Acceptance of goods.—

* It is well settled, that in cases of negligence, the subsequent acceptance of the goods is no bar to an action for injuries such as those of which we have been treating. Nothing but a release or satisfaction constitutes such a bar. But acceptance may be given in evidence in reduction of damages, so as to limit the recovery to the actual loss sustained by the owner.^{(b)**}

§ 849. Insurance money.—The carrier in an action against him for injuries to the goods through his negligence, is not entitled to a deduction for so much of the loss as is covered by insurance.^(c)

§ 850. Consequential damages.—The reasonable expenses of searching for lost goods may be recovered.^(d) Where the property lost consisted of a set of plans for building a house, damages for delay in building the house are too remote when the defendant had no notice.^(e) Loss suffered on account of a sub-contract cannot be recovered ^(f) unless the carrier had notice of it.^(g)

¹ Story on Bailments, § 582a; *Bowman v. Teall*, 23 Wend. 306.

(*) *Caldwell v. Southern Ex. Co.*, 1 Flip. 85.

(b) *Hackett v. B. C. & M. Railroad*, 35 N. H. 390.

(c) *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584; *Merrick v. Brainard*, 38 Barb. 574.

(d) *North M. R.R. Co. v. Akers*, 4 Kas. 453; *Farwell v. Davis*, 66 Barb. 73; *Davis v. Cincinnati, H. & D. R.R. Co.*, 1 Disney 23; *Morrison v. European & N. A. Ry. Co.*, 2 Pugs. 295. *Contra*, *Mississippi C. R.R. Co. v. Kennedy*, 41 Miss. 671.

(e) *Mather v. American Ex. Co.*, 138 Mass. 55.

(f) *Caledonian Ry. Co. v. Colt*, 3 Macqueen 833; *Baxendale v. London, C. & D. Ry. Co.*, L. R. 10 Ex. 35.

(g) *Illinois C. R.R. Co. v. Cobb*, 64 Ill. 128.

§ 851. **Limited liability.**—The carrier may by special contract limit his liability in case of loss to a certain amount; and in that case the owner's recovery will be limited to that amount.^(*) But the limitation must be a reasonable one. A limitation of liability for loss or damage to the goods does not operate to limit liability for delay in delivery.^(b)

§ 852. **Injury during transportation.**—Where goods are injured during transportation the measure of damages is the difference between their value in their damaged state at the place of destination and what it would have been there if they had been delivered in good order.^(c) From this amount, however, is to be subtracted the rebate in customs allowed by the custom-house officers on a "damaged appraisement."^(d) Such actual value should be ascertained by a public sale to the highest bidder.^(e) So where goods were thus damaged during transportation, and were received by consignees upon an understanding that the depreciation was to be made good to them, and they were sold at auction by the consignees, but with the assent of the master: it was held that for the purpose of

(*) *Harris v. Packwood*, 3 Taunt. 264; *Hart v. Pennsylvania R.R. Co.*, 112 U. S. 331 (citing all the authorities); *St. Louis, I. M. & S. Ry. Co. v. Weakly*, 50 Ark. 397; *Hill v. Boston, H. T. & W. R.R. Co.*, 144 Mass. 284.

(b) *Vroman v. American M. U. E. Co.*, 2 Hun 512.

(c) *The Compta*, 5 Sawy. 137; *The Mangalore*, 9 Sawy. 71; 23 Fed. Rep. 463; *The Colonel Ledyard*, 1 Sprague 530; *Magdeburg G. I. Co. v. Paulson*, 29 Fed. Rep. 530; *Western M. Co. v. The Guiding Star*, 37 Fed. Rep. 641; *Chicago, B. & Q. R.R. Co. v. Hale*, 83 Ill. 360; *Lewis v. The Success*, 18 La. Ann. 1; *Brown v. Cunard Steamship Co.*, 147 Mass. 58; *Louisville & N. R.R. Co. v. Mason*, 11 Lea 116. In two cases where the goods were not carried far, the measure of damages was said to be the difference in value when delivered to the company and when received: *McHenry v. Philadelphia, W. & B. R.R. Co.*, 4 Harr. 448; *Black v. Camden & A. R.R. & T. Co.*, 45 Barb. 40.

(d) *The Mangalore*, 9 Sawy. 71; 23 Fed. Rep. 463.

(e) *Henderson v. The Maid of Orleans*, 12 La. Ann. 352.

making adjustment of the amount due from the vessel for the injury, the sum realized at the sale should be regarded as the value of the goods in their damaged state.^(*) The law imposes on the carrier by sea the duty of taking such reasonable and ordinary measures as are practicable to preserve the cargo from the serious deterioration which without such measures would result from an accident occurring during the transportation, even although the accident be one for which the ship would not be originally liable. And where a cargo of beans had been to some extent injured by having been wet, and notwithstanding that the ship had stopped for repairs on the voyage at an intermediate port, where the beans might readily have been dried, and thereby saved from further deterioration, the voyage was pursued without this having been done, the owner of the beans was held entitled to recover damages, the measure of which should be the difference between the damage they would probably have sustained if unshipped and dried at the intermediate port, and that which they actually sustained by having been carried thence undried to the port of destination.^(b) In an action against a railway company for damages to a lot of flour, it was held that the plaintiff might prove and recover as his damages the reasonable and necessary expenses of putting the flour in a salable condition, it appearing that the expenses were for the defendant's benefit.^(c)

Where goods were both damaged and delayed in transit, and during the delay the market had risen, so that the increased value through the rise in price was greater than the diminution through the injury, it was

(*) *The Columbus*, 1 Abb. Adm. 97.

(b) *Notara v. Henderson*, L. R. 7 Q. B. 225.

(c) *Wiane v. Illinois C. R.R. Co.*, 31 Ia. 583.

nevertheless held that the plaintiff should recover damages for the injury according to the general rule.^(*) The court said: "They (the defendants) cannot now be allowed to take advantage of their own wrong, and claim a participation of profits growing out of a rise in the market price. . . . To do this would be to bestow a premium on the misconduct of the respondents." A subsequent rise or fall in price does not affect the measure of damages; they are to be estimated according to the price in the market when the goods were or should have been delivered.^(b)

§ 853. **Misdelivery.**—If the result of a misdelivery is a loss of the goods to the owner, the measure of damages is the same as in case of non-delivery.^(*) If they are delivered to the owner, but at the wrong place, the cost of removing the goods to the place where they should have been delivered would be the usual measure of damages.^(d)

Where a carrier delivered goods to the wrong person, who accounted for them to the owner, it was held the latter could only recover nominal damages.^(*) And when the owner received part of the value of the goods from the person to whom they were delivered, his recovery was reduced by that amount.^(f) Where a carrier, having instructions to deliver cotton at Norfolk to a factor who had been directed to hold it until further orders, delivered it instead to a factor, at Petersburg,

(*) *Morrison v. Florio S.S. Co.*, 36 Fed. Rep. 569, 571.

(b) *The Compta*, 5 Sawy. 137.

(*) That is, the value at the time and place of delivery less the unpaid freight: *Baltimore & O. R.R. Co. v. Pumphrey*, 59 Md. 390; *Forbes v. Boston & L. R.R. Co.*, 133 Mass. 154.

(d) *Chicago & N. W. Ry. Co. v. Stanbro*, 87 Ill. 195.

(*) *Rosenfield v. Express Co.*, 1 Woods 131.

(f) *Jellett v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 265.

who, having no instructions about it, sold it immediately, and cotton rose rapidly and steadily after the sale, the court applied the rule of damages that governs the case of factors who sell their principals' goods without authority, and held the carrier liable, at least for the price at the time the plaintiff got the full advice of the sale.^(*)

§ 854. *Delay in delivery.*—The extent of a carrier's liability for delay in the transportation or delivery of goods has been a subject of much discussion. Where there is no injury to the goods, and they are offered to the owner after the time when, by his express or implied contract, it was the carrier's duty to deliver them, the owner is not entitled to refuse to receive them with the view of holding the carrier for their full value. If he does so, he can recover, in the absence of special circumstances, an indemnity only for his actual loss.^(b) The measure of damages in the ordinary case is the difference in the value of the goods at the time and place they ought to have been delivered, and at the time of their actual delivery,^(c) less unpaid freight,^(d) with interest.^(e) So

(*) *Arrington v. Wilmington & W. R.R. Co.*, 6 Jones L. 68. For this rule see ch. xv.

(b) *St. Louis, I. M. & S. Ry. Co. v. Mudford*, 44 Ark. 439; *Scovill v. Griffith*, 12 N. Y. 509; *Briggs v. New York C. R.R. Co.*, 28 Barb. 515; *Nettles v. South Carolina R.R. Co.*, 7 Rich. L. 190.

(c) *Collard v. Southeastern Ry. Co.*, 7 H. & N. 79; 30 L.J. (N.S.) Ex. 393; 4 T. L. Rep. (N.S.) 410; *Bussey v. M. & L. R. R.R. Co.*, 4 McCrary 405; *Atlanta & W. P. R.R. Co. v. Texas Grate Co.*, 81 Ga. 602; *Wilson v. Atlanta & C. Ry. Co.*, 82 Ga. 386; *East Tennessee, V. & G. Ry. Co. v. Johnson*, 11 S. E. Rep. 809 (Ga.); *Galena & C. U. R.R. Co. v. Rae*, 18 Ill. 488; *Weston v. Grand T. Ry. Co.*, 54 Me. 376; *Ingledeu v. Northern R.R. Co.*, 7 Gray 86;

(d) *Page v. Munro*, 1 Holmes 232 (*semble*); *St. Louis, I. M. & S. Ry. Co. v. Phelps*, 46 Ark. 485; *Lindley v. Richmond & D. R.R. Co.*, 88 N. C. 547.

(e) See most of the authorities above cited, and *Dunn v. Hannibal & S. J. R.R. Co.*, 68 Mo. 268; *Houston & T. C. Ry. Co. v. Jackson*, 62 Tex. 209; *Newell v. Smith*, 49 Vt. 255.

where cattle shrink in weight through delay in transportation, the loss through the shrinkage may be recovered.^(a) So in Vermont, a carrier engaging to transport live stock to market by the following market day, and failing to do so, is liable for the difference between what the stock was necessarily sold for, and what it would have brought on the market day.^(b) In *Sisson v. Cleveland & T. R.R. Co.*,^(c) the contract of the carrier was to transport from Toledo to Buffalo, cattle whose ultimate destination, as the carrier was informed at the time, was the Albany or New York market. There was no fall in prices before the cattle had reached Buffalo, but owing to the defendant's delay, they were not delivered at Albany until after a decline had occurred. The court held the loss to be the direct consequence of the defendant's delay attending the cattle to their destination, as the effects of a fatal injury would have followed them to their death, and one therefore for which the carrier must make compensation. Where cattle are delayed in transit so that they reach their destination too late to

Cutting v. Grand T. Ry. Co., 13 All. 381; *Scott v. Boston & N. O. S.S. Co.*, 106 Mass. 468; *Clement & H. M. Co. v. Meserole*, 107 Mass. 362; *New Orleans, J. & G. N. R.R. Co. v. Tyson*, 46 Miss. 729 (*semble*); *Faulkner v. South P. R.R. Co.*, 51 Mo. 311; *Rankin v. Pacific R.R. Co.*, 55 Mo. 167; *Ward v. New York C. R.R. Co.*, 47 N. Y. 29; *Zinn v. New Jersey S. B. Co.*, 49 N. Y. 442 (*semble*); *Holden v. New York C. R.R. Co.*, 54 N. Y. 662; *Sherman v. Hudson R. R.R. Co.*, 64 N. Y. 254; *Nettles v. South Carolina R.R. Co.*, 7 Rich. L. 190; *East Tennessee, V. & G. R.R. Co. v. Hale*, 85 Tenn. 69; *Texas P. Ry. Co. v. Nicholson*, 61 Tex. 491; *Newell v. Smith*, 49 Vt. 255; *Peet v. Chicago & N. W. Ry. Co.*, 20 Wis. 594; *Monteith v. Merchants' D. & T. Co.*, 1 Ont. 47; 9 Ont. App. 282.

^(a) *Illinois C. R.R. Co. v. Owens*, 53 Ill. 391; *Kansas P. Ry. Co. v. Reynolds*, 8 Kas. 623; *Smith v. New Haven & N. R.R. Co.*, 12 All. 531; *Sturgeon v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 569; *Glascocock v. Chicago & A. R.R. Co.*, 69 Mo. 589; *Ayres v. Chicago & N. W. Ry. Co.*, 75 Wis. 215.

^(b) *King v. Woodbridge*, 34 Vt. 565.

^(c) 14 Mich. 489.

be sold in the market on Saturday, the owner may recover for shrinkage until Monday's market.^(*) So in an action by a cap manufacturer for damages for the loss sustained by delay in the delivery of cloth, by which the plaintiff had lost the season for making it into caps, it was held by the English Court of Common Pleas, that although the loss of profits as such could not be taken into account, within the rule of *Hadley v. Baxendale*, yet the loss in the market value of the goods through their arriving too late for the season was a proper element of damages.^(b)

Where, from the carrier's inexcusable delay, peas shipped from Canada to New York were stopped on the way by the freezing of the lakes, and would have been detained through the season, and on the carrier refusing to carry them to New York by rail, or deliver them to the plaintiff except on payment of freight, the plaintiff replevied them, and sent them to the Boston market, which was a judicious course, he was held entitled to recover the difference between the net proceeds of their sale at Boston and their market value at New York, at the time when they should have been delivered.^(c) If there is no recovery on account of depreciation, the loss of use of the property during the period of delay may be recovered ;^(d) thus in case of delay in the transportation of money interest may be recovered.^(e)

§ 855. *Delay in transporting by sea.*—In case of transportation by sea, the general rule has been disapproved in England. The *Parana* ^(f) was a libel by

(*) *Ayres v. Chicago & N. W. Ry. Co.*, 75 Wis. 215.

(b) *Wilson v. Lancashire & Y. Ry. Co.*, 9 C. B. N. S. 632.

(c) *Laurent v. Vaughn*, 30 Vt. 90.

(d) *Murrell v. Dixey*, 14 La. Ann. 298 ; *Smith v. Whitman*, 13 Mo. 352.

(e) *United States Ex. Co. v. Haines*, 67 Ill. 137.

(f) 1 P. D. 452 ; 2 P. Div. 118.

the assignee of bills of lading (a mortgagee) against a ship-owner for delay in the arrival of his ship. The libellant claimed damages for leakage of some sugar which had been shipped, and for loss on account of a fall in the price of hemp between the time when the ship ought to have arrived and the time when she did arrive. The plaintiff had kept the hemp for some time afterwards, and had then sold it at a considerable loss. It was held proper to allow damages for leakage of the sugar, but it was held error to allow damages for loss of the market, *i. e.*, the difference in price between the two dates. Such a profit, it was said, was too speculative. Mellish, L. J., adopted the rule laid down by the court below:

“The principle is now settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.”

He proceeded :

“There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long voyage by sea, where there has been what may be called a merely accidental fall in price between the time when the goods ought to have arrived, and the time when they did arrive—no case, that I can discover, where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. Or, if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late

and selling for a lower sum. But there is, in this case, no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower."

As to the cases in which damages for such loss of profits were allowed against railway companies, he said :

"When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the courts treated them as if the goods were consigned for the purpose of immediate sale."

After citing two such cases,^(*) he continued :

"The difference between cases of that kind and cases of the carriage of goods for a long distance by sea, seems to me to be very obvious. In order that damages may be recovered, we must come to two conclusions—first, that it was reasonably certain the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of those two assumptions in this case. Goods imported by sea may be, and are every day, sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not usually prevented from selling his goods because they are at sea. The sale of goods to arrive, the sale of goods on transfer of bill of lading, with cost bills and insurances, is a common mercantile contract made every day. . . . It was said that the goods were sold, and that if the person who sells them does not suffer the damage, then the purchaser would suffer the damage. But that is pure speculation. If a man purchases goods while they are at sea, no person can say for what purpose he purchases them. . . . In this particular case the plaintiff did not sell the goods when they ar-

(*) *Collard v. Southeastern Ry. Co.*, 7 H. & N. 79; *Ward v. New York C. R.R. Co.*, 47 N. Y. 29.

rived, for he sold them some months afterwards, when a further fall had taken place in the market. Of course, he does not seek to recover from the defendant that additional loss, but this serves to illustrate how uncertain it is whether he would have sold them. If he did not sell them when they did arrive, but kept them because he thought the market would rise, how can we tell that he would not have done exactly the same thing if the goods had arrived in time? Therefore, it seems to me, that to give these damages would be to give speculative damages—to give damages when we cannot be certain that the plaintiff would not have suffered just as much if the goods had arrived in time."

We have quoted from this opinion at length because it illustrates the difficulties which arise from the introduction into cases of this character of what seems to be an irrelevant question. We have already had occasion in the chapter on Sales^(*) to criticise the reasons so often given for the rule of market value in that class of cases—that the purchaser can *replace himself* at that price. If what we have said is sound, it is equally objectionable in the class of cases now under consideration to treat the rule of market value as dependent upon the intention of the consignee to sell again. The foundation of the rule is that the consignee is entitled to the *actual value* of the goods at the time agreed upon for delivery. This is what he is deprived of by the breach of contract. There is nothing speculative in this as a measure of damages, and he is equally entitled to it, whether he keeps, sells, gives away, or destroys the goods. Nor can it make any difference whether the transportation is by land or sea.

§ 856. Consequential damages.—In *Vicksburg & M. R.R. Co. v. Ragsdale*,^(b) an action for delay in transport-

(*) § 735.

(b) 46 Miss. 458.

ing a boiler intended for a saw-mill, Simrall, J., laid down the following rules: 1. The proximate natural consequence of the breach must always be considered. 2. Such consequences as from the nature and subject-matter of the contract may be reasonably thought to have been in the contemplation of the parties at the time it was entered into, should also be taken into account. 3. Damages not the natural sequence of the breach shall not be recovered, unless by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties. 4. Loss of profit in a business cannot be allowed, unless the data of estimate are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract, or by explanation of the circumstances at the time it was made, that such damages would ensue from non-performance. 5. If the contract was made with reference to embarking in a new business, such as sawing lumber, the speculative profits which might have been expected, but which were defeated, cannot be looked to as an element of damage. 6. If the delay is in the transportation of machinery to be applied to a special use known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by the rental price or other approximate means, the expense of hands left idle, and the loss of gains on work contracted to be done, if such work could have been done had the machinery been delivered. 7. The party injured must not remain inactive, but should make reasonable exertions to help himself and diminish the responsibility of the party in default to him. In the case at bar, he said that compensation should be given for loss of use of the machinery, expense of idle hands, and of

search for the machinery, and injuries to the machinery because of delay.

* Where in consequence of the delay it became necessary to remove the goods to another place to sell them, it was considered that the expenses of such removal were rightly recoverable ; but the question of such necessity is of course for the jury.¹** In an action against a carrier for delay in delivering machinery, the measure of damages was held to be the value of the use of the machinery during the period of improper detention.(*) The carrier cannot be holden for time, nor for expenses, if they are not the natural and necessary consequences of the delay.(^b) So in Georgia, where a manufacturer's business was suspended in consequence of delay in the arrival of coal through the carrier's default, evidence of the amount of profit which might have been realized but for the delay, is held not to be admissible.(^c)

In a case in the Court of Queen's Bench, where some regalia which were to be used in a procession by the plaintiff, and which he had hired at an expense of £20, were not delivered by the carrier in time for the procession, and the plaintiff was at an expense of £5 in looking for the goods, he was held entitled to recover the latter item, on account of unreasonable delay, but not the former, which was too remote, the carrier having had no notice of the object for which the goods were to be used. Lord Cockburn, C. J., said : " It is a reasonable doctrine not to make the carrier liable for damage sus-

¹ *Black v. Baxendale*, 1 Ex. 410.

(*) *Priestly v. Northern Indiana & C. R.R. Co.*, 26 Ill. 205 ; *acc.* *U. S. Ex. Co. v. Haines*, 67 Ill. 137.

(^b) *Benson v. New Jersey R.R. & T. Co.*, 9 Bosw. 412.

(^c) *Cooper v. Young*, 22 Ga. 269 ; *acc.* *Haas v. Kansas City, F. S. & G. R.R. Co.*, 81 Ga. 792.

tained in consequence of goods not arriving in time, unless he had notice that time was of importance ; but the person who sends his goods is entitled to expect that they shall be sent from place to place in a reasonable time."(*) So, also, the hotel expenses of a traveller waiting for a parcel delayed by a carrier who was not informed of the purpose for which it was intended, were held too remote.(b) If, however, a notice is given of any particular object in view in making the shipment, the special damages can be recovered.(c) In *Horne v. Midland Ry. Co.*(d) the defendant knew that the plaintiffs had shipped their goods to meet a contract, but did not know the terms of that contract. It was held that the notice was not sufficient to charge the defendant with the loss of an exceptional contract, but only of one at the usual market rates. The plaintiff can recover for the loss of profits he would have made out of a special contract, if he gave notice of that contract.(e) So in New Hampshire, where a large quantity of wool was delivered to the Grand Trunk Ry. Co. for transportation to Boston. The agent

(*) *Hales v. London & N. W. Ry. Co.*, 4 B. & S. 66, 70.

(b) *Woodger v. Great Western Ry. Co.*, L. R. 2 C. P. 318.

(c) In a somewhat early case, where in consequence of the carrier's unreasonable delay in the delivery of an account of the plaintiff against a third party, it was barred by the statute of limitations, he was held liable for the amount. *Favor v. Philbrick*, 5 N. H. 358. The sum involved in this case was small, and the decision would seem to have gone on the right rather than the measure of recovery. To make it, as regards the latter point, conform to the law as now established, the carrier should have notice beforehand of the particular necessity for punctual delivery ; and it should have appeared also, if the point were controverted, that the debt would have been collectible but for the statute. On this question there appears to have been no evidence.

(d) L. R. 7 C. P. 583 ; L. R. 8 C. P. 131.

(e) *Illinois Central R.R. Co. v. Cobb*, 64 Ill. 128. But not if the jury believe that the sub-contract would not have been carried out. *Illinois Cent. R.R. Co. v. Cobb*, 64 Ill. 143.

of the company was informed that it was sold if it could go at once, and agreed that it should go next morning. But the defendant delayed transporting it more than three weeks, and in consequence of the delay the purchaser declined to take it. Meantime the demand and price had declined, and the defendant was held liable for the difference between the contract price and the value of the goods when delivered.^(*) So in the case of *Wilson v. York, Newcastle and Berwick Ry. Co.*^(b) it was held by Jervis, C. J., at *Nisi Prius*, that a carrier undertaking to carry fish to a particular market in time for the morning's sale was liable for the profit lost by his failure to get them there in time for that sale. This case, which preceded *Hadley v. Baxendale*, is also justified by the second head of the rule adopted in that case. In *Grindle v. Eastern Express Co.*^(c) the plaintiff's intestate delivered to the defendant some money to be sent to B. to pay the premium on an endowment policy. The defendant knew the purpose for which the money was sent, but failed to deliver it in time, consequently the policy lapsed. It was held that the plaintiff could recover the net value of the policy when it lapsed. It was also held, however, that the defendant would not be liable for such damages as the plaintiff, by the use of reasonable means, such as by reinstating himself with the company or by reinsuring, might have avoided. It has been held that when goods were addressed "To the show ground at N.," there was sufficient notice that they were sent for a

(*) *Deming v. Railroad*, 48 N. H. 455; *acc.* *St. Louis, I. M. & S. Ry. Co. v. Mudford*, 48 Ark. 502 (*semble*); *Chicago & A. R.R. Co. v. Thrapp*, 5 Ill. App. 502. In *Medbury v. New York & E. R.R. Co.*, 26 Barb. 564, such damages were allowed, though the report of the case does not show that the carrier had notice of the contract.

(b) 18 Eng. L. & E. 557.

(c) 67 Me. 317.

special show, and the plaintiff was allowed to recover the loss suffered by missing the show. Damages were allowed for loss of profits and of time.^(*) The carrier had notice that a reciprocity treaty was about to expire, and if transportation into the United States was delayed, a heavy duty must be paid. Upon delay it was held that the owner might recover the amount of the duty, though the price at the point of destination had risen more than that amount during the period of delay.^(b)

§ 857. *Delay in unloading a vessel.*—Demurrage, in the strict sense of the term, means a sum of money due by express contract for the detention of a vessel in loading one or more days beyond the time allowed for that purpose in the charter-party. It seems that the *consignee* cannot be made liable *for demurrage* where there is in the charter-party, or bill of lading, no express agreement or stipulation in respect to detention in loading or unloading; but the *freighter* is liable for unnecessary detention, although no express contract is made on the subject; and compensation for such detention may be recovered under the name of demurrage.^(c) It was said, however, in a case in the New York Supreme Court, that although there has been no special agreement between a shipper of goods and the master of a vessel for demurrage, yet if the vessel is improperly detained an unreasonable length of time by the freighter or *consignee*, the owner of the vessel may recover damages, in the nature of demurrage, for such detention. That was, however, an action against the freighter. The damages in these cases should be limited to compensation for the time the vessel was actually detained by the consignee beyond a reasonable

(*) *Simpson v. London & N. W. Ry. Co.*, 1 Q. B. D. 274.

(b) *Gibbs v. Gildersleeve*, 26 Up. Can. Q. B. 471.

(c) *Sprague v. West*, 1 Abb. Adm. 548.

time for the discharge of her cargo.^(a) Damages are measured by the value of the use of the vessel.^(b) In an action for delay in discharging the plaintiff's ship, by which the plaintiff lost profits which he would have derived from the passage money of emigrants, it was held that the defendant could not reduce the damages by showing that the plaintiff derived a benefit from this failure, from the fact that the emigrants embarked on other ships in which he was part owner.^(c)

§ 858. *Agreement to furnish freight.*—* An interesting question is sometimes presented where the carrier brings suit on the violation of an agreement to furnish him a stipulated quantity of freight. And here the principle applies which we have already had occasion to notice, that the party plaintiff is bound to take reasonable measures to reduce the amount of injury consequent on the defendant's default; and it is held, that the carrier must stand ready to receive any other freight that is offered, and thus, as far as is reasonably practicable, avoid throwing an unnecessary loss on the party in default.^(d) Thus in New York, it has been decided, where a party contracts to load a ship with a given number of tons at a stipulated price, and fails to deliver the whole quantity, that if goods are offered by a third person to be shipped, to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at current prices, the owner or master is bound to receive such goods, and place to the credit of the original charterer the net earnings of the substituted cargo, after

(^a) *Clendaniel v. Tuckerman*, 17 Barb. 184; *acc. Wordin v. Bemis*, 32 Conn. 268; *Morse v. Pesant*, 2 Keyes 16.

(^b) *In re Trent & Humber Co.*, L. R. 4 Ch. 112; *The Pietro G.*, 39 Fed. Rep. 366.

(^c) *Jebson v. East & W. I. D. Co.*, L. R. 10 C. P. 300.

(^d) *Murrell v. Whiting*, 32 Ala. 54; *Utter v. Chapman*, 38 Cal. 659.

making all reasonable deductions resulting from the circumstances of the case ; and such is the English rule.¹

In a case² that came up in the Supreme Court of the United States, from the Pennsylvania Circuit, the plaintiff's intestate agreed to deliver for the defendant at St. Louis, by a certain time, a quantity of army stores *supposed* to amount to 3,700 barrels, which the defendant on his part agreed to furnish on the Ohio river: the defendant to pay a certain sum per barrel, one-half to be paid at St. Louis and the other half at Cincinnati, with a memorandum "that the payment to be made at Cincinnati was to be made in the paper of the Miami Exporting Company or its equivalent." The defendant did not furnish the whole 3,700 barrels: and the plaintiff brought suit as well for the freight of the portion furnished, as damages for the non-delivery of the remainder. The notes of the Miami Company were not worth more than 66 per cent. The judge who tried the cause held—

"That the plaintiff could not recover damages according to the *number of tons* the boat was capable of containing. The rule of law in cases where there has been a failure to furnish the stipulated freight, and there exists no charter-party, is for the jury to take all the circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport in addition to that which was furnished. If the lading should not be complete, without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight nor the least; and such average is the proper measure of damages."

And that as to the paper of the Miami Exporting

¹ Heckscher v. McCrea, 24 Wend. 304; Shannon v. Comstock, 21 Wend. 457; Fuller v. Staniforth, 11 East 232. See these cases cited and confirmed in Costigan v. Mohawk & Hudson R. R. Co., 2 Denio 609. See also, the reasoning of these cases adopted in Arkansas, in an able opinion of Scott, J., as to a

contract for personal services. Walworth v. Pool, 9 Ark. 394; Abbott on Shipping, part iv, ch. 1, of the carriage of goods in merchant ships, and cases there cited.

² Robinson v. Noble, 8 Peters 181, 184.

Company, the defendant having failed to tender to the plaintiff's intestate that paper or its equivalent, the plaintiff was entitled to recover the amount in specie with interest. The Supreme Court reversed this judgment on the grounds that the defendant had not stipulated to furnish any precise amount of freight, and that the specie value of the notes at the time they should have been paid was the rule by which the damages should have been estimated.¹ (*)**

The measure of damages against a charterer who refuses to furnish a cargo according to his contract is the amount the vessel would have earned at the rates specified, deducting her net earnings during the time she would have been occupied in the charter, including the lay days, or if she remained idle the amount she should have earned.^(b) But where, by the terms of the charter, different articles of freight are to be paid for at different rates by weight, and the freighter is at liberty to supply them in such proportions as he may choose, the proper measure of damages in an action for not supplying cargo is the average value of freight for the voyage, calculated on the various rates of freight in the proportion of the different articles usually carried on similar voyages.^(c) But where some

¹ This case, though it raises some important questions, properly decides nothing as to the amount of damages; but it may be noticed, as to the latter point, that it is adverse to the decisions of the courts of New York in regard to notes payable in a specific article, it being there held, that if the specific article is not tendered the party loses his privilege, and must pay in money.

(*) But the general rule is in accordance with the above case. See §§ 280, 281.

(b) *Hunter v. Fry*, 2 B. & Ald. 421; *Smith v. McGuire*, 3 H. & N. 554; *Greenwell v. Ross*, 34 Fed. Rep. 656; *Utter v. Chapman*, 38 Cal. 659; *Bangor Furnace Co. v. Magill*, 108 Ill. 656; *Husten v. Richards*, 44 Me. 182; *Barker v. Borzone*, 48 Md. 474; *Dean v. Ritter*, 18 Mo. 182; *Heckscher v. McCrea*, 24 Wend. 304; *Ashburner v. Balchen*, 7 N. Y. 262; *Stone v. Woodruff*, 28 Hun 534; *Mitchell v. Cornell*, 44 N. Y. Super. Ct. 401; *Heilbronner v. Hancock*, 33 Tex. 714.

(c) *Thomas v. Clarke*, 2 Starkie 450.

of the enumerated articles are limited as to the amount which may be carried, and that limit has been reached, the freight of substituted articles can be calculated only on an average of the remaining goods.^(a) Where goods are wrongfully taken from a vessel by the shipper before the commencement of the voyage, the ship-owner is not entitled to the stipulated freight as such, but only to an indemnity for the breach of contract. All the attendant circumstances should be laid before the jury, to enable them to determine what will be an indemnity. If the carrier has received other goods in place of those withdrawn, or if by diligence he might have done so, or if he could have abandoned the contemplated voyage, and have found other employment for his vessel, these facts may be ground for a deduction from the entire sum stipulated to be paid as freight.^(b) On a contract to furnish freight at a distant port to load a vessel which goes to the port, but finds none, and is compelled to return empty, the measure of damages is the contract price.^(c)

CARRIERS OF PASSENGERS.

§ 859. *Form of action.*—The liability of a carrier of passengers is a subject which has become of great practical importance since the introduction of railroads, and the subject of the measure of damages for breach of contract of carriage of a passenger has been much discussed. The relation between carrier and passenger is more than a mere contract relation; indeed, it may exist in the absence of contract. It is clear that any person rightfully on the cars of a railway company is entitled to pro-

^(a) Cockburn *v.* Alexander, 6 C. B. 791.

^(b) Bailey *v.* Damon, 3 Gray 92.

^(c) Bradley *v.* Denton, 3 Wis. 557.

tection by the carrier, though he is a free passenger.^(*) Any breach of this duty owed by the carrier to the passenger would seem to be a tort; recovery may be had either in an action of tort or in an action for breach of the contract. The contract made by a common carrier of passengers (and we shall see that the same is true of contracts made by all incorporated telegraph companies) is not a simply voluntary engagement such as an ordinary contract *inter partes*, but an agreement made in pursuance of an obligation towards all the world imposed either by his mere status as common carrier, or under his charter, or both. In other words, it is a contract which he is under a duty to make, and under a duty to perform, so that a breach is not a mere breach of contract, but also, as we have said, a tort.

In *Hobbs v. London & Southwestern Ry. Co.*,^(b) Blackburn, J., said (and this explains why this case in which the pleadings were clearly drawn in tort was treated as contract): "The action is in reality upon a contract; it is commonly said to be founded upon a duty, *but it is a duty arising out of a contract.*" But surely the duty arising out of a contract is merely another term for the obligation of a contract. In every carrier's contract, there is of course this contractual or conventional duty; but as just stated, the contract itself is entered into in pursuance of a duty owed to all the world. Hence it is more true to say that every breach of a carrier's contract is also the breach of an antecedent duty.

§ 860. **Personal injury.**—Where the passenger is injured physically by the negligence of the carrier, the measure of recovery is usually that adopted in ordinary

(*) *Philadelphia & R. R.R. Co. v. Derby*, 14 How. 468, 485, *per* Grier, J.; *New York C. R.R. Co. v. Lockwood*, 17 Wall. 357.

(b) L. R. 10 Q. B. 111, 119.

cases of physical injury,^(a) that is, compensation for pain and suffering and for loss of time while incapacitated from work, medical expenses, and compensation for any permanent injury or loss of earning power. The fact that services for nursing were rendered gratuitously does not reduce the amount to be recovered on account of reasonable medical expenses.^(b) In order to show the value of his lost time, a professional man may show his past earnings ;^(c) thus a teacher of French has been allowed to show the number of his scholars and the amount of his earnings in previous years.^(d) The general rules as to certainty of proof are to be observed. Thus in a late case in Georgia,^(e) an action for permanent personal injury, it was held erroneous to admit evidence that the plaintiff, a postal clerk, was in the line of promotion, and might have been promoted soon after the accident. Simmons, J., said : " While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons." The loss of promotion was clearly conjectural, even without considering the political reasons which may influence appointments.

§ 861. *Nervous shock.*—In *Bell v. Great Northern Ry.*

^(a) See § 481 *et seq.*

^(b) *Pennsylvania R.R. Co. v. Marion*, 104 Ind. 239.

^(c) See § 180.

^(d) *Simonin v. New York, L. E. & W. R.R. Co.*, 36 Hun 214.

^(e) *Richmond & D. R.R. Co. v. Allison*, 12 S. E. Rep. 352.

Co.(*) it appeared that while the plaintiff was travelling as a passenger in an excursion train over the defendants' line of railway, the train, which was too heavy to be carried by the engine up an incline, was divided by the defendants' servants, the carriage occupied by the plaintiff remaining attached to the engine. The after part of the train having thereupon descended the incline with great velocity, the engine was reversed, and with the remaining carriages (including that in which plaintiff was seated) followed down the incline, also at a high rate of speed, until violently stopped. It was proved that plaintiff was put in great fright by the occurrence, and that she suffered from nervous shock in consequence of such fright. She was incapacitated from performing her ordinary duties, and there was evidence that paralysis might ensue. Upon the trial, the judge charged the jury that if great fright was, in their opinion, a reasonable and natural consequence of the circumstances proved, and if injury to the plaintiff's health was, in their opinion, a reasonable and natural consequence of such great fright, and was actually occasioned thereby, damages for such injury would not be too remote. The defendant requested the judge to charge that if damages or injury were the result of, or arose from, mere fright, not accompanied by actual physical injury, even though there might be a nervous or mental shock occasioned by the fright, such damages would be too remote. This charge the court declined to give.

Palles, C. B., said, of the defendants' request (p. 437):

"This presupposes that the plaintiff sustained, by reason of the defendants' negligence, 'injury' of the class left to the consideration of the jury by the summing-up, *i. e.*, injury to health,

(*) 26 L. R. Ir. 428.

which is bodily or physical injury ; and the proposition presented is that damages for such injury are not recoverable, if two circumstances occur : (1) if the only connection between the negligence and this bodily injury is that the former caused fright, which caused nervous or mental shock, which shock caused the bodily injury complained of ; and (2) that this so-called bodily injury did not accompany the fright, which I suppose means that the injury, although in fact occasioned by the fright, assumed the character of bodily injury subsequently to, and not at, the time of the negligence or fright. To sustain this contention, it must be true whether the shock which it assumed to have caused was either mental or nervous ; and as the introduction of the word 'mental' may cause obscurity, by involving matter of a wholly different nature, unnecessary to be taken into consideration here, I eliminate it from the question. If there be a distinction between mental shock and nervous shock, and if the proposition be not true in the case of nervous shock, then the objection cannot be sustained.

"It is, then, to be observed : (1) that the negligence is a cause of the injury, at least in the sense of a *causa sine qua non* ; (2) that no intervening independent cause of the injury is suggested ; (3) that jurors, having regard to their experience of life, may hold fright to be a natural and reasonable consequence of such negligence as occurred in the present case.

"If, then, such bodily injury as we have here, may be a natural consequence of fright, the chain of reasoning is complete. But the medical evidence here is such that the jury might from it reasonably arrive at the conclusion that the injury, similar to that which actually resulted to the plaintiff from the fright, might reasonably have resulted to any person who had been placed in a similar position. It has not been suggested that there was anything special in the nervous organization of the plaintiff which might render the effect of the negligence or fright upon her different in character from that which it would have produced in any other individual. I do not myself think that proof that the plaintiff was of an unusually nervous disposition would have been material to the question ; for persons, whether nervous or strong-minded, are entitled to be carried by railway companies without unreasonable risk of danger ; and my only reason for referring to the circumstance is to show that, in this particular case, the jury might have arrived at the conclusion that the

injury which did, in fact, ensue was a natural and reasonable consequence of the negligence which actually caused it.

“Again, it is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and injury, yet such relation *cannot* in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time—say a week, a fortnight, or a month—must result, without any intervening cause, in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration. This train of reasoning might be pursued much farther; but in consequence of the decision to which I shall hereafter refer, I deem it unnecessary to do so.”

The learned Chief Baron then referred to the case of *Victorian Railway Commissioners v. Coultas*,^(*) in which the Privy Council held that mere mental terror was not a consequence which would ordinarily flow from the negligence proved in that case. This case, however, was not approved; but the court followed an earlier unreported Irish case,^(b) where compensation for injury resulting from nervous shock was allowed in a much stronger case than the one at bar. The learned Chief Baron continued (p. 442):

“In conclusion, I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such

(*) 13 App. Cas. 222.

(b) *Byrne v. Great Southern & W. Ry. Co.*, in the Court of Appeal.

injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompany such negligence in point of time."

The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated.

§ 862. **Failure to carry a passenger.**—Where a carrier fails to transport a passenger, the latter may recover the expense of carriage by another train, and the loss of time and expenses, such as hotel bills, incurred in waiting for the other train.^(a) So where a person in a foreign port contracted with the master of a vessel for a passage to this country, and paid a part of the passage-money in advance, but the master failed to fulfil his contract, it was held that the other party was entitled to recover the sum paid in advance, the expenses incurred in awaiting the sailing of another ship, and the sum paid to the second vessel for a passage in her.^(b) In these cases it is said that the whole passage-money paid for securing other transportation can be recovered; but it would seem that only the excess over what would have been paid the defendant should be recovered.

Damages are also recoverable for time lost by the delay.^(c) Where the object of the plaintiff was to go upon an excursion to a certain place, and he took a later train, but was so late as to miss the object of the excursion, it was said that he might have compensation for loss of time until his return.^(d) So where the action

^(a) *Baltimore & O. R.R. Co. v. Carr*, 71 Md. 135; *Eddy v. Harris*, 15 S. W. Rep. 107 (Tex.).

^(b) *The Zenobia*, 1 Abb. Adm. 80; *acc. Porter v. The New England*, 17 Mo. 290.

^(c) *Baltimore & O. R.R. Co. v. Carr*, 71 Md. 135.

^(d) *Eddy v. Harris*, 15 S. W. Rep. 107 (Tex.), *semble*.

was for neglect to transport the passenger across the Isthmus of Panama, the latter's expenses during the detention and those of a consequent illness, and the time lost by him both directly from the detention and by the illness afterwards, so far as these were occasioned by the carrier's negligence and breach of duty, were all declared by the New York Court of Appeals legitimate items of damage.^(*) In *Baltimore & O. R.R. Co. v. Carr*^(b) it is said that compensation in such case may be recovered for mere inconvenience, "if it is such as is capable of being stated in a *tangible form*, and assessed *at a money value*." In Mississippi the physical condition of a passenger who had suffered great bodily exposure in consequence of the carrier's neglect to stop his vessel and take him on board, according to agreement, was allowed to be shown in aggravation of the damages.^(c)

A passenger, in order to avoid a delay, can only incur a reasonable expense. He cannot take a special train in order to avoid a slight delay. In *Le Blanche v. London & N. W. Ry. Co.*^(d) it was said that a good test of the reasonableness of taking the special train would be an inquiry whether or not the plaintiff would have taken the special train if he had lost the train through his own fault, and had not the company to look to for compensation.

§ 863. **Delay in transporting a passenger.**—The rules are much the same where the carrier wrongfully delays transportation. The value of the time lost may be recovered. Evidence of the rate of wages earned by persons of the plaintiff's trade at the place of his destination, during the

(*) *Williams v. Vanderbilt*, 28 N. Y. 217.

(b) 71 Md. 135, 144.

(c) *Heirn v. McCaughan*, 32 Miss. 17.

(d) 1 C. P. D. 286.

period of the delay, is admissible to guide the jury in fixing the damages. But that rate is not the measure. The jury are to consider the probabilities that the plaintiff would have obtained employment immediately upon his arrival, and that it would have continued during the entire period of the delay ;^(*) and the fact that there was no evidence of the value of the plaintiff's time, does not preclude the jury from giving him such compensation therefor as they think reasonable.^(b) In *Hamlin v. Great Northern Railway Co.*^(c) the plaintiff was delayed on the defendant's road so that he could not get from G. to H. in the evening, as he had intended to do. He therefore remained for the night at G. and went to H. the next morning. It was held that he could not recover for a failure to keep appointments with customers at H. He could only recover the expense of his night's lodging. In a case in the Texas Court of Appeals it appeared that the plaintiff was forced to wait at the defendant's station for a delayed train. The station was insufficiently warmed, and the plaintiff contracted a severe cold while waiting for the train. It was held that he could recover compensation for the cold.^(d)

§ 864. *Failure to carry to destination.*—Where the carrier breaks the contract of carriage by failing to carry the passenger to his destination, and set him down there, the measure of damages is in general the same, whether the breach of contract consists in a wrongful expulsion from the train, or in setting the passenger down at the wrong station or carrying him beyond his station. The

(*) *Yonge v. Pacific M. S.S. Co.*, 1 Cal. 353.

(b) *Ward v. Vanderbilt*, 34 How. Pr. 144.

(c) 1 H. & N. 408.

(d) *Texas & P. Ry. Co. v. Mayes*, 15 S. W. Rep. 43.

passenger may recover all the expenses of delay,^(a) such as loss of time,^(b) and also the expense of a reasonable conveyance to his destination.^(c) Where the master of one of a line of steamers plying to and from San Francisco, and then bound to that port, having on board a person who had, under pain of death, in case of his return, been expelled thence by the "Vigilance Committee," a revolutionary authority in actual government of the city, stopped his vessel and put the passenger on a return steamer of the same line, to be taken back to the port from which he had embarked, although the act was illegal, the circumstances which induced it were allowed as an important mitigation of the damages, which were therefore reduced by the Supreme Court of the United States, on appeal, from \$4,000 to \$50. Inconvenience, loss, and delay subsequently sustained by the passenger in getting to San Francisco, in consequence of the generally known power and purpose of the "Vigilance Committee," were not attributable to the master, and could not be compensated in the action.^(d)

§ 865. *Indignity of expulsion.*—The plaintiff may recover compensation for the indignity of being ejected from the train.^(e) In Iowa and Michigan, it is held that

^(a) *Chicago & A. R.R. Co. v. Flagg*, 43 Ill. 364; *Pennsylvania R.R. Co. v. Connell*, 127 Ill. 419; *Trigg v. St. Louis, K. C. & N. Ry. Co.*, 74 Mo. 147.

^(b) *Hamilton v. Third Ave. R.R. Co.*, 53 N. Y. 25.

^(c) *Indianapolis, B. & W. Ry. Co. v. Birney*, 71 Ill. 391 (*semble*); *Pennsylvania R.R. Co. v. Connell*, 127 Ill. 419; *Francis v. St. Louis T. Co.*, 5 Mo. App. 7; *Hamilton v. Third Ave. R.R. Co.*, 53 N. Y. 25.

^(d) *Pearson v. Duane*, 4 Wall. 605.

^(e) *Coppin v. Braithwaite*, 8 Jur. 875; *Louisville & N. R.R. Co. v. Whitman*, 79 Ala. 328; *Head v. Georgia P. Ry. Co.*, 79 Ga. 358; *Chicago & A. R.R. Co. v. Flagg*, 43 Ill. 364; *Chicago & N. W. Ry. Co. v. Williams*, 55 Ill. 185; *Chicago & N. W. Ry. Co. v. Chisholm*, 79 Ill. 584; *Pennsylvania R.R. Co. v. Connell*, 112 Ill. 295; *Lake E. & W. Ry. Co. v. Fix*, 88 Ind. 381; *Shepard v. Chicago, R. I. & P. Ry. Co.*, 77 Ia. 54; *Southern K. Ry. Co. v.*

if the conductor acted considerately, the plaintiff should have felt no sense of insult, and therefore cannot recover damages for the indignity;^(a) but such is not the general rule. Good faith on the part of the conductor may, however, be shown to prevent the allowance of exemplary damages.^(b)

It has been attempted in some cases to restrict the damages in the case of wrongful expulsion for refusal to pay fare to the amount of fare demanded by the conductor, on the ground that the plaintiff should have paid the fare demanded, and thus avoided expulsion. But this is rightly held not to be required of the passenger; for as we have seen,^(c) a person is not called upon to anticipate a wrong, and need take no steps to avoid the consequences of the defendant's wrongful act before it is committed. A passenger who, through the negligence of one conductor, is not furnished with a stop-over ticket, to which he is entitled, and who, on attempting to resume his journey after a stop, is required by a second conductor to pay additional fare or leave the train, may elect to leave the train, and in that case may recover from the railway company not merely the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained

Rice, 38 Kas. 398; Carsten *v.* Northern P. Ry. Co., 44 Minn. 454; Hamilton *v.* Third Ave. R.R. Co., 53 N. Y. 25; Smith *v.* Pittsburg, F. W. & C. Ry. Co., 23 Oh. St. 10; Stutz *v.* Chicago & N. W. Ry. Co., 73 Wis. 147.

^(a) Paine *v.* Chicago, R. I. & P. Ry. Co., 45 Ia. 569; Fitzgerald *v.* Chicago, R. I. & P. Ry. Co., 50 Ia. 79; Batterson *v.* Chicago & G. T. Ry. Co., 49 Mich. 184.

^(b) Fitzgerald *v.* Chicago, R. I. & P. Ry. Co., 50 Ia. 79; Philadelphia, W. & B. R.R. Co. *v.* Hoeflich, 62 Md. 300; Logan *v.* Hannibal & S. J. R.R. Co., 77 Mo. 663; Hamilton *v.* Third Ave. R.R. Co., 53 N. Y. 25; Yates *v.* New York C. & H. R. R.R. Co., 67 N. Y. 100; Tomlinson *v.* Wilmington & S. C. R.R. Co., 12 S. E. Rep. 138 (N. C.).

^(c) § 224.

by him as the direct and natural consequence of the fault of the first conductor. (*)

§ 866. **Compensation for the risk of injury.**—It is a matter of some doubt whether exposure to risk, which did not result in actual injury, is a matter for compensation. In *Chicago & A. R.R. Co. v. Flagg* (b) the court said that the plaintiff could recover compensation for “the risk to which he was subjected.” But in *Trigg v. St. Louis, K. C. & N. Ry. Co.* (c) Hough, J., said: “We have not been referred to any case in which a simple exposure to averted danger has been held to be a ground of recovery, and we do not think it should be, unless the exposure were wanton and produced injury.” This seems the correct view; for since all circumstances subsequent to the defendant’s act are admissible to show the actual injury, the fact that a risk resulted in no actual injury should prevent the allowance of damages for it, since there is no loss to be compensated.

It may, however, appear that the risk caused fright and mental suffering or nervous shock, and in such a case there is no principle upon which, if the defendant committed an actionable wrong, damages for the suffering caused by the risk should be refused. So where the plaintiff was suffering from hernia, it was held that the jury in estimating damages for wrongful expulsion from the train might consider his mental suffering caused by the risk of his injury being aggravated, though, in fact, no actual aggravation of the hernia was proved. (d)

§ 867. **Consequences of exposure.**—The question has been much discussed, in the class of cases now under

(a) *Yorton v. Milwaukee, L. S. & W. Ry. Co.*, 62 Wis. 367.

(b) 43 Ill. 364.

(c) 74 Mo. 147, 154.

(d) *Fell v. Northern P. R.R. Co.*, 44 Fed. Rep. 248.

consideration, whether damages can be recovered for illness caused by exposure to the weather. The leading case upon the subject is *Hobbs v. London & S. W. Ry. Co.*^(*) In that case, which though in form tort was treated by the court as an action of contract, it appeared that the plaintiff, with his wife and two children, took tickets to H. They were set down at E. It being late at night the plaintiff could not get a wagon or accommodation at an inn. He and his family had to walk four or five miles in a rainy night, and the wife caught cold, was laid up for some time and unable to assist her husband. Expenses were incurred for medical attendance on her. The jury found £8 for the inconvenience suffered by having to walk home, and £20 for the wife's illness and its consequences. It was held that the plaintiff could recover the £8, but not the £20, since the illness was not a natural consequence of putting passengers down at the wrong station. Cockburn, C. J., said (p. 119): "It is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences." And Archibald, J., said (p. 125): "With regard to what might be the result of the walk home, the wet night, the condition of health, the state of the plaintiff herself, all those things could not have been in the contemplation of the parties when they made the contract." Blackburn and Mellor, JJ., said simply "they are too remote."

(*) L. R. 10 Q. B. 111.

In *McMahon v. Field* (*) the Court of Appeal disapproved of this decision. Bramwell, L. J., said :

"I must say I do not see why a passenger who, by the default of the railway company, was obliged to walk home in the dark, might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur."

And Brett, L. J., said :

"It was said that such damage was too remote to be recovered. Why was it too remote? There was no accommodation or conveyance to be obtained at Esher at that time of night, so that it was not only reasonable that they should walk, but they were obliged to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman, and then turned her out in the middle of the night with only her night-clothes on, would it not be a natural consequence that she would take a cold? Had Esher station been a large one, and had there been flies which might have been had, or accommodation at an inn, and the passengers had refused such and elected to walk home, I should have thought then that what happened arose from their own fault, but that was not so, yet, nevertheless, the judges who decided *Hobbs v. London & S. W. Ry. Co.* decided, as a matter of fact, that the cold was so improbable a consequence that it was not to be left to the jury whether it was occasioned by the breach of contract. It is not, however, necessary for me to say more than that I am not contented with it, for there is a difference between such a case and the present one."

§ 868. *American rule.*—In this country the authority of *Hobbs v. London & S. W. Ry. Co.* is generally acknowledged, at least nominally ; and it has been followed to the full extent in a few jurisdictions.(b) But the practical effect of it has been neutralized in most jurisdictions by holding that it is of no authority in cases

(*) 7 Q. B. Div. 591, 594, 596.

(b) *Pullman P. C. Co. v. Barker*, 4 Col. 344 (an action on the case) ; *Murdock v. Boston & Albany R.R. Co.*, 133 Mass. 15 (an action of contract).

where the action sounds in tort. Where this is the case any injury directly caused by the *necessary* resulting exposure is a matter for compensation.^(*) It is said in these cases that where the breach of contract was caused by an act which was not tortious, the rule in Hobbs' case would apply;^(b) but in none of these cases has this distinction been applied, for the action has always been treated as sounding in tort.

§ 869. *Pullman Palace Car Co. v. Barker.*—In *Pullman Palace Car Co. v. Barker* ^(c) the plaintiff, a woman, who at the time was unwell, was travelling in one of the defendant's cars and was compelled to leave the car at night on account of the burning of the car through the defendant's negligence. She caught a cold, which, owing to the condition of her health at the time, resulted in a serious illness. She brought an action of tort. The court held that the illness was remote. Elbert, J., said:

"The exposure to the cold was the direct and necessary result of the appellant's negligence. Her subsequent illness, however, was not the result of the exposure, but the result of the exposure *in her then condition*. Here, then, intervenes an independent cause of her illness, a cause resting in her physical condition, appertaining exclusively to herself, with which the appellant had no concern, and to which it sustained no relations either by contract or by the general duty imposed by law upon carriers of passengers. Where physical weakness or disability is apparent to, or is brought to the attention of the carrier, undoubtedly that high degree of care which the law imposes upon him would,

(*) *Alabama G. S. R.R. Co. v. Heddleston*, 82 Ala. 218; *Cincinnati, H. & I. R.R. Co. v. Eaton*, 94 Ind. 474; *Baltimore C. P. Ry. Co. v. Kemp*, 61 Md. 74, 619; *Heirn v. M'Caughan*, 32 Miss. 17; *Williams v. Vanderbilt*, 28 N. Y. 217; *I. & G. N. Ry. Co. v. Terry*, 62 Tex. 380; *Brown v. Chicago, M. & S. P. Ry. Co.*, 54 Wis. 342; *Yorton v. Milwaukee, L. S. & W. Ry. Co.*, 62 Wis. 367.

(b) See especially *Cincinnati, H. & I. R.R. Co. v. Eaton*, 94 Ind. 474; *Brown v. Chicago, M. & S. P. Ry. Co.*, 54 Wis. 342.

(c) 4 Col. 344, 347.

under certain circumstances, involve duties in reference thereto. . . . Persons who are ill have a right to enter the cars of a railroad company and travel therein; as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions affecting their fitness to journey, certainly where they are unknown to the carrier, must rest upon their own shoulders."

The court cited *Hobbs v. London & S. W. Ry. Co.* in support of its opinion. The case has been severely criticised.^(*)

§ 870. *Brown v. Chicago, M. & S. P. Ry. Co.*—The question was again elaborately discussed and the authorities examined in *Brown v. Chicago, M. & S. P. Ry. Co.*^(b) In that case the plaintiffs were left at night in a place where no houses were to be seen, at a distance from their destination. They walked to their destination, which the jury found a reasonable act. The female plaintiff was pregnant at the time, and the exposure resulted in a miscarriage and illness. The court held that compensation might be recovered for the illness. Taylor, J., said (p. 357):

"Upon the findings of the jury in this case, it appears that the defendant was guilty of a wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendant's wrongful act; and that, on account of the peculiar state of health of Mrs. Brown at the time, she was injured by such walk. There was no intervening independent cause of the injury, other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it

(*) *Cincinnati, H. & I. R.R. Co. v. Eaton*, 94 Ind. 474; *Brown v. Chicago, M. & S. P. Ry. Co.*, 54 Wis. 342.

(b) 54 Wis. 342.

must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act or results from the act of the party in endeavoring to escape from the immediate danger. . . . The defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause ; and it is its proximate cause, within the rules of law upon that subject." (*)

§ 871. **General conclusions.**—The objections to recovery made in *Hobbs v. London & S. W. Ry. Co.* and the cases following it seem to be two : first, that the consequence is remote ; second, that it was not contemplated at the time the contract was entered into. To the first of these objections the reasoning of the court in the case of *Brown v. Chicago, M. & S. P. Ry. Co.*, just quoted, seems to be a conclusive answer. The defendant has placed the plaintiff in a difficult position, from which he must escape by the best means possible. If the means of escape he adopts are reasonable ones, all loss caused directly by the adoption of such means is the proximate result of the defendant's wrong, and compensation is therefore recoverable for it. To the second objection there appear to be two answers. In the first place, the defendant's act is a tort, and although the relation between the parties probably began in a contract,

(*) This is an application of the principle so universally acknowledged, that where the plaintiff takes proper means to avoid the consequences of defendant's act (*e.g.* tries to avoid further injury by getting to her destination as soon as possible), and by doing so, enhances the damages, the defendant is still responsible. See § 215.

yet it is not necessary to invoke the contract in order to recover. The rule in *Hadley v. Baxendale*, therefore, even if we assume that that case introduced a distinction between contract and tort, does not apply. But even if the action is upon the contract, as it was in the case of *Murdock v. Boston & A. R. R. Co.*,^(*) the objection would not seem to be sound. This appears plainly upon consideration of the facts of *Pullman P. C. Co. v. Barker*, in which the court refused recovery. The plaintiff was actually driven from the car by the defendant's negligence, half-clad, on a cold night; and illness naturally and almost necessarily followed. To say that such a consequence was remote, or to exclude recovery for it because the fact of the plaintiff's physical infirmity was not known to the defendant's agent when she purchased her seat, is indeed, in the language of the Supreme Court of Wisconsin,^(b) a decision "supported by the principles of neither law nor humanity."

Upon the whole, these cases seem to illustrate very strongly a point upon which too much insistence cannot be laid; that the case of *Hadley v. Baxendale* introduced no new rule of damages. For proximate and natural consequences of the defendant's act, whether it be a breach of contract or a tort, a recovery can always be had; the only meaning of the rule with regard to the contemplation of the parties is that in contract a particular species of proof as to special consequences is often available which is not so in tort.

§ 872. **Avoidable consequences.**—An important consideration in such cases is whether the plaintiff might not have avoided the exposure by reasonable efforts. If a journey on foot to the place of destination is not neces-

(*) 133 Mass. 15, *supra*.

(b) In *Brown v. Chicago, M. & S. P. Ry. Co.*, 54 Wis. 342, 360.

sary or reasonable, of course any injury contracted by reason of the journey is due to the plaintiff's own folly, and is remote from the defendant's act. So where the plaintiff should have obtained shelter for the night at the place where he was left by the defendant, he cannot recover damages for injury caused by walking to his destination.^(*) And so also, where a conveyance can be procured.^(b) In the latter case the plaintiff, a physician, walked home instead of waiting for the next train, and contracted an illness from the exposure. Walker, J., said :

“ Had he procured a carriage and horses to make the trip, the company would no doubt have been liable for reasonable compensation for its use and for a driver, or had he awaited the next train, and gone on it, he would have been entitled to nominal damages at least, and could have recovered for all such actual damages as he could have proved in the way of necessarily increased expenses while awaiting the arrival of the train, and loss by being unable to visit patients who required his medical advice, or injury or loss he may have actually sustained in his business, caused by the delay ; but he had no right to inflict injury upon himself to enhance damages he sought to recover from the road. Having been wrongfully left by the train, if he supposed his business was so urgent as to prevent his awaiting the next train, he should have used all precautions in so making the journey as to produce the least injury to himself that reason would dictate. He had no right to act with recklessness or wantonly, and then claim compensation for the injury thus inflicted. Had he attempted to walk to the next station barefoot, and his feet had been frozen, would any sane man believe he could have recovered for such injury ? We presume not, because all would say it was a voluntary wantonness. Then, if two other modes presented themselves, almost perfectly safe from injury, as was the case here, and another, attended with great hazard from the exposure to extreme cold and over-exertion, as all reasonable persons must know, why should he be rewarded for dis-

(*) Louisville, N. & G. S. R.R. Co. v. Fleming, 14 Lea 128.

(b) Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391.

regarding his safety and the consequent injury? The injury by the journey on foot was unnecessarily incurred—was not the necessary consequence of being left by the train, but was unnecessarily, if not recklessly, induced. It was the improper, voluntary act of the appellee, and for it he has no right to recover."

§ 873. **Baggage.**—If baggage is lost which the carrier takes charge of without remuneration, the passenger can only recover damages for the loss of what is usually carried as baggage, including such an amount of money as is necessary and proper for the journey under the circumstances of the case. He cannot, for instance, recover for jewelry which was carried in his trunk as merchandise.^(*) In *Fairfax v. New York C. & H. R. R.R. Co.*,^(b) the plaintiff's baggage was delivered to the defendant by a connecting line by mistake for another line. Upon arrival in New York the plaintiff found the defendant had brought the trunk to New York, but on demanding it was unable to find it. In the plaintiff's trunk were thirty-nine sovereigns. The jury were told to allow the value of these if they found the amount was proper, reasonable, and necessary, and in deciding this, to take into consideration the position and circumstances of the plaintiff, the length and character of his journey, the contingencies and accidents that might naturally arise, and the fact that he was in a foreign country, and to give the plaintiff the full value of his clothing for use to him in New York, and not merely what it could be sold for in money. This was held to be correct. "No other rule would give him a compensation for his damages. This rule must be adopted, because such clothing cannot be said to have a market price, and it would not sell for what it was really worth."

(*) *Michigan C. R.R. Co. v. Carrow*, 73 Ill. 348; *Richards v. Westcott*, 2 Bosw. 589.

(b) 73 N. Y. 167, 172. See § 251.

CHAPTER XXIX.

THE MEASURE OF DAMAGES IN ACTIONS AGAINST TELEGRAPH COMPANIES.

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| <p>§ 874. Nature of contract.</p> <p>875. Nature of liability—Not common carriers.</p> <p>876. Reasonable regulations.</p> <p>877. Action by sender—Contract.</p> <p>878. Action by receiver—Tort or contract.</p> <p>879. Compensation only for natural and contemplated consequences.</p> <p>880. Notice.</p> <p>881. Consequential loss.</p> <p>882. Commercial messages—Loss of intended purchase.</p> <p>883. Loss of intended sale.</p> <p>884. Error in transmitting amount of goods.</p> <p>885. In transmitting price.</p> | <p>§ 886. In transmitting conditions of purchase or sale.</p> <p>887. Loss of a debt.</p> <p>888. Speculative loss.</p> <p>889. Uncertain profits not recoverable.</p> <p>890. Messages not understood—Cipher messages.</p> <p>891. Authorities extending liability—Direct loss.</p> <p>892. What is the direct loss.</p> <p>893. Price of the message—Nominal damages.</p> <p>894. Mental suffering.</p> <p>895. Avoidable consequences.</p> <p>896. Exemplary damages.</p> <p>897. Causa proxima.</p> |
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§ 874. Nature of contract.—Suits against telegraph companies present many peculiar features, both in relation to the question of liability, and of the extent of recovery. A telegraph company is an agency (usually chartered by the State, and clothed by it with the powers of eminent domain) for conveying intelligence by electricity. A telegraph line might, of course, be operated by an individual, or a partnership, but usually there is a charter. Under this, the company is obliged to take all messages, for which it is entitled to establish a tariff of charges. It thus stands in a double relation, analogous to that occupied by common carriers of goods and passengers. It

enters into a contract with the persons employing it, but it does this in pursuance of a duty imposed upon it by the State. Hence its contract is different in kind from all ordinary agreements, and a breach of it is different in its consequences. It is different again from the contract of a common carrier, because it relates to the carriage and delivery, not of chattels, but of intelligence, that is, of something incorporeal and intangible. These peculiarities have led the courts to take somewhat conflicting views as to the nature of the liability of telegraph companies.^(*)

§ 875. *Nature of liability—Not common carriers.*—Many of the earlier cases in which the question of the liability of telegraph companies for mistakes and delays in sending messages arose, inclined to the doctrine that they were subject to the same liabilities as common carriers of goods. In the case of *Bowen v. Lake Erie T. Co.*^(b) the Court of Common Pleas of Ohio, at *Nisi Prius*, on that ground held the company to the same degree of liability as a common carrier, although not in terms calling it a common carrier, considering that as these companies hold themselves out to transmit dispatches correctly, they are under obligation to do so, unless prevented by causes over which they have no control. In this case owing to a mistake of the defendants in transmitting a dispatch, one hundred shawls, instead of a single one, were sent from New York to Michigan, and the damages which the jury found in conformity with the charge of

(*) It is universally conceded that for accidents produced by such unforeseen causes (or acts of God), as electrical disturbances, a telegraph company is not responsible. *Daughtery v. Am. Un. Tel. Co.*, 75 Ala. 168.

(b) 1 Am. Law Reg. 685 (1858). The same decision has been arrived at on the same ground in other cases: *Parks v. Alta C. T. Co.*, 13 Cal. 422; *Shearman & Redfield on Negligence*, § 545 *et seq.* See for other cases *Gray on Com. by Tel.* § 6.

the court, consisted of a sum equal to the charges for freight and the depreciation in value of the shawls, which had to be reshipped to the plaintiffs, and reached them after the shawl season had closed.

But this theory of the liability of telegraph companies has now been abandoned.^(*) It is perfectly well settled that they are not to be classed with common carriers of goods. The question which seems to have caused most difficulty is raised by the nature of the subject of the contract. It is a contract to convey intelligence. The dispatch, however, may as in the case of a cipher dispatch disclose nothing whatever as to the nature of the transaction to which it relates. On the other hand, a message may disclose the general nature of the transaction to which it relates, as in the case of an order to buy something. It may, further, disclose the nature of the thing to be bought. Another message may disclose the quality and quantity ordered, while still another may make it plain that the article is wanted to fill a sub-contract. The telegraph company usually derives its only knowledge of the object to be effected from the message itself, and hence in some cases is in absolute ignorance, in others has complete knowledge, and in still others can only surmise what the object is, or what the loss in consequence of any mistake or negligence in transmission will be. In the case of an ordinary contract, the parties know necessarily the general object of it, and the only question is how far they shall be held bound to have contemplated the consequences of a breach. But in agreements of the sort we are now considering, one

(*) *Tyler v. Western U. T. Co.*, 60 Ill. 421; *Birney v. New York & W. P. T. Co.*, 18 Md. 341; *Grinnell v. W. U. T. Co.*, 113 Mass. 299; *W. U. T. Co. v. Carew*, 15 Mich. 525; *Leonard v. New York, A. & B. M. T. Co.*, 41 N. Y. 544; *Breese v. U. S. T. Co.*, 48 N. Y. 132; *Kiley v. W. U. Tel. Co.*, 109 N. Y. 231; *W. U. Tel. Co. v. Griswold*, 37 Oh. St. 301.

party knows in a multitude of cases little or nothing as to the object of the contract or probable consequences of a breach. Some courts have thought that the liability should be treated as that of a bailee for hire; others have suggested an analogy to the liability of carriers of passengers. We think, however, that it will be found most safe in the present condition of the authorities not to insist upon a very exact definition of the liability. For our purposes it will be better to examine the extent of recovery allowed by the courts in the various classes of cases that have come before them.

§ 876. **Reasonable regulations.**—Telegraph companies have the right to make reasonable regulations, and these, if brought home to the party with whom they contract, are binding.^(*) One of the most common of these is a rule which has grown out of the character of the business, that unless the sender repeats a message,—that is, has it telegraphed back for comparison, at an increased rate,—the company will not be liable for errors beyond a stipulated amount, usually the price of the message. A repetition is such an obvious safeguard, that the regulation has always commended itself as reasonable and proper; the only question discussed being how far the company can by such a regulation exempt itself from the consequences of its own negligence.

The regulation of telegraph companies, that they will not be liable for errors or delays in unrepeatd messages beyond a stipulated amount, usually the price of the message, is in most jurisdictions held to be binding on the sender.^(b) It has been made a question how far it affects

(*) *West. U. Tel. Co. v. Carew*, 15 Mich. 525. See an interesting note on this subject 4 Law. Rep. Ann. 611.

(b) *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231; *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299.

the receiver. In *New York & W. P. T. Co. v. Dryburg*,^(*) Woodard, J., said that if it be granted that the sender, on account of failure to repeat, could not hold the company liable, it did not follow that the receiver could not. Commenting on this in *Harris v. Western Union Tel. Co.*^(b) Mitchell, J., said :

"It may very well be that the regulation as to repetition of messages will become so universal in the practice of telegraphy, that it will be considered to be known, constructively at least, to all persons sending or receiving messages, and that it will be held negligence in any person to act upon any important telegram without having it repeated; but such custom is not in evidence in this case, and it is not for this court to lead the way in such decision."

Remarks of the same tenor were made by Daly, F. J., in *De Rutte v. New York A. & B. Tel. Co.*^(c) Until such custom is established, the fact that the message is that of another person, and that the receiver has no opportunity to agree to any condition on the subject of repetition before delivery, would seem to be conclusive.^(d)

Messages designed for transmission are now almost uniformly written on printed blanks, defining the conditions upon which the company agrees to send them. So far as these conditions are reasonable, they form part of the contract.^(e) And it seems that this is so, even where the statute provides that a telegraph company is liable for all mistakes in transmitting messages.^(f) In

(*) 35 Pa. 298, 303.

(b) 9 Phila. 88.

(c) 1 Daly 547.

(d) *De la Grange v. Southwestern Tel. Co.*, 25 La. An. 383.

(e) *United States T. Co. v. Gildersleve*, 29 Md. 232; *Ellis v. American T. Co.*, 13 All. 226; *Wann v. Western U. T. Co.*, 37 Mo. 472; *Passmore v. Western U. T. Co.*, 78 Pa. 238; *Womack v. Western U. T. Co.*, 58 Tex. 176.

(f) *Sweatland v. Illinois & M. T. Co.*, 27 Ia. 433. But where a statute gave \$100 damages for sending a telegram out of order, the whole amount

Bartlett v. Western Union Telegraph Co.,^(*) a limitation exempting the defendant from liability for errors or delay, from whatever cause occurring, was held void. The limitation will not excuse gross negligence or fraud.^(b) But in *Clement v. Western U. T. Co.*,^(c) where the auditor found that a messenger was guilty of gross negligence, Morton, C. J., said :

"The only negligence shown in this case was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt, entrusted for delivery. It may be that the company might be guilty of some fraudulent or gross negligence in transmitting or delivering a message, so that it would not be protected by its regulation from liability for the actual damages, though in excess of the sum stipulated. But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation ; and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility. Without discussing the question as to what is the difference, if any, between ordinary and gross negligence, we are of opinion that the only negligence proved in this case was such negligence as the parties intended to include in their stipulation ; and that such stipulation, as applied to such negligence, is reasonable and valid."

§ 877. *Action by sender—Contract.*—An action by the sender of a message against a telegraph company for failure to transmit or mistake or delay in transmission is usually an action of contract ; and in such an action, in ascertaining the damages caused by a telegraph company's

was held recoverable without proof of loss, notwithstanding a limitation of liability. *Western U. T. Co. v. Buchanan*, 35 Ind. 429.

(*) 62 Me. 209 ; *acc.* *True v. International T. Co.*, 60 Me. 9.

(b) *Manville v. Western U. T. Co.*, 37 Ia. 214 ; *Redpath v. Western U. T. Co.*, 112 Mass. 71 ; *Western U. T. Co. v. Weiting*, 1 Tex. App. Civ. 801.

(c) 137 Mass. 463, 466.

mistake or neglect, the same rules apply as in other cases of breach of contract. If no damages are proved, nominal damages can be recovered, as the law infers some damage from the breach of contract. (*)

§ 878. **Action by receiver—Tort or contract.**—It is generally held in the United States that an action may be brought by the person to whom the message is addressed. In *Elwood v. The Western Union Telegraph Co.* (†) the defendant delivered as genuine a message purporting to be from the officer of a bank, addressed to the plaintiff, saying that the bank would pay the checks of a third party to the amount of \$20,000. The plaintiff paid \$10,000, and the message was then discovered to be a forgery. In an action on the case the company was held liable to the plaintiff for the amount paid. In another case, (‡) it was said that when there has been a delay or mistake in the transmission of a message, which has been productive of injury or damage to the person by whom, or for whom, the company was employed, “to that person they are responsible, whether he was the one who sent or the one who was to receive the message.” The basis of the right of action is sometimes said to be tort, and sometimes contract. In the former case, the right would rest on the public duty to convey messages assumed by telegraph companies: in the latter upon the interest of the receiver in the contract made by the sender. As in the case of carriers, it will often be found difficult to say that the action sounds exclusively in either. (d) Perhaps the following considerations already

(*) *First Nat. Bk. of Barnesville v. Western U. T. Co.*, 30 Oh. St. 555 (1876).

(†) 45 N. Y. 549.

(‡) *De Rutte v. New York A. & B. Tel. Co.*, 1 Daly 547, 555.

(d) *Western U. Tel. Co. v. Hope*, 11 Bradw. 289; *Rose v. U. S. T. Co.*, 6 Robt. 305; *New York & W. P. T. Co. v. Dryburg*, 35 Pa. 298; *Aiken v.*

adverted to, may throw some light on this point. Every contract made by a telegraph company is made in pursuance of a duty imposed upon it by the State, and any breach of it is not only a breach of contract, but a tort, for the duty assumed involves the performance of this contract, not merely as it affects the sending, but as it affects the delivering of messages. The telegraph company is under a duty to all the world, and a breach of its contract with the sender is a breach of this duty, as it affects the receiver.

In *Bank of Cal. v. W. U. Tel. Co.*,^(*) the receiver brought an action of tort for loss caused by paying money on a forged telegraphic order. The question was not discussed, but the sender could not have brought any action, as the forgery was committed by him, and he, personating a fictitious person named as payee in the order, collected the money.^(b)

§ 879. Compensation only for natural and contemplated consequences.—In determining the telegraph company's liability, the question has usually been taken to be whether the information as to the nature of the dispatch, and of the possible consequences of a failure to deliver it correctly, has been so properly and fully given to the company, as to charge it, in case of its default, under the

W. U. Tel. Co., 5 S. C. 358; and see, for an interesting discussion of the subject, *Gray on Com. by Tel.* ch. vii. In England, however, the telegraph company cannot be made liable for loss through neglect to send a message in an action by the sender. *Playford v. United Kingdom Tel. Co.*, L. R. 4 Q. B. 706; *Dickson v. Reuter's Tel. Co.*, 2 C. P. D. 62; 3 C. P. Div. 1. This is on the ground that the obligation of the carrier to use due care arises out of contract only, and that the contract is with the sender of such messages only, and not with the receiver.

^(*) 52 Cal. 280.

^(b) *West. U. T. Co. v. Fenton*, 52 Ind. 1, is a case in which it was held that the receiver could bring an action, but the decision was based on a statute.

rules in *Hadley v. Baxendale*, with the loss sustained. Where the company has no notice of the nature of the transaction, either from the message itself or from information given it at the time of sending the message, the damages have been held to be merely the cost of the message. Thus in *Beaupré v. Pacific & Atlantic Telegraph Co.*^(*) the plaintiff sent a message, "Will take 200 extra mess," meaning he would take pork of that quantity and quality. The message was delayed. It was held that the plaintiff could not recover for a fall in the market, but only the cost of the message.

In the case of *Landsberger v. The Magnetic Telegraph Company*,^(b) the plaintiff at New Orleans having contracted with a third person to buy goods for him on commission at New York, and bound himself to fulfil the contract in a specified sum as liquidated damages, remitted funds to New York to be used in the agreed purchase, which he telegraphed his agent in New York to make. The dispatch directed the plaintiff's firm in New York to get from the Pacific Mail Company \$10,000, which the plaintiff had remitted thither by that company, but did not indicate the particular purpose to which it was to be applied, in a manner intelligible to the telegraph company. Through the company's default, the message failed to reach New York in time to have the purchase made, so that the plaintiff lost his commissions and the use of his money for the time, and had to pay the stipulated damages. The court, intending to apply the rule in *Hadley v. Baxendale* and *Griffin v. Colver*,^(c) held that he could recover only the cost of the dispatch and the interest of his money while it lay

(*) 21 Minn. 155.

(b) 32 Barb. 530.

(c) See §§ 144, 145.

idle. The loss of the commission and the payment of the liquidated damages were not regarded as having entered into the contemplation of the parties at the time the contract was made. In *Lowery v. Western Union Telegraph Co.*^(*) A. delivered to the defendant a message directed to the plaintiff, asking for \$500. By the defendant's negligence this was changed to \$5,000. The plaintiff sent A. \$5,000, who appropriated it and absconded. The plaintiff afterwards recovered part from A. It was held that the plaintiff could not recover his loss from the defendant, as it was not the natural and probable result of the defendant's negligence. In *Baldwin v. The United States Telegraph Co.*^(b) damages for loss of a bargain were refused. The plaintiff had received an offer for his interest in an oil well. He telegraphed by defendant and a connecting company to an agent, inquiring how much the well was producing. At the time of sending the message he informed the operator of the connecting company that, unless he received an answer promptly he would sell his interest. The defendant negligently delayed the delivery of the message and the plaintiff accordingly sold his interest. Soon afterwards he received from his agent an offer of \$1,200 more than the price for which he had sold it. It was held that this sum could not be recovered, as the purpose of the telegram was not known to the defendant, and the damages were not within the contemplation of the parties.

In another case, by a mistake of the telegraph company, the plaintiff was informed that he could be furnished with 8,000 bushels of wheat for transportation from Chatham to Oswego. The dispatch should have stated 3,000

(*) 60 N. Y. 198.

(b) 45 N. Y. 744.

bushels. In consequence of the wrong information, he gave up a contract for a cargo from Detroit, and sent his vessel to Chatham, where he obtained the 3,000 bushels only. It was held, that the only damages which would naturally flow from the defendant's default, or which could have been in the contemplation of both parties at the time of the delivery of the dispatch for transmission, was a reasonable compensation for sending the vessel to Chatham and back. The plaintiff was not entitled to freight on the five thousand bushels the vessel did not carry, as it did not appear that he could have obtained this freight if the message had been correctly transmitted. His real damage consisted in giving up his contract; and this he could not recover, because the fact of his having such a contract had not been communicated to the defendant. (*) In a case in Louisiana it appeared that the plaintiff's cane was frosted, and he telegraphed for sulphate of lime, by the use of which damage could be averted; no notice of the use to which it was intended to put the sulphate of lime was given to the company. The message was not delivered, and the crop was lost. The damage was held too remote for compensation. (b)

A. dispatch announcing that the plaintiff, as agent for A., had sold pork at a certain price, was not delivered, and when A. finally learned the facts he disaffirmed the sale, and the plaintiff was obliged to compensate the purchaser; if the sale had been disaffirmed at once there would have been no loss. It was held that the company had no notice of the importance of the message, since it referred to a past transaction, and the plaintiff was limited to nominal damages. (*)

(*) *Lane v. Montreal T. Co.*, 7 Up. Can. C. P. 23.

(*) *Deslottes v. Baltimore & O. T. Co.*, 40 La. Ann. 183.

(*) *Hord v. Western U. T. Co.*, 6 Amer. Law Rec. 529.

On the other hand, in *Hadley v. Western U. T. Co.*(*) the message accepted an offer for the sale of cattle and asked the plaintiff to meet the purchaser at a certain place to have the cattle weighed. By a delay in delivery, the cattle were left standing in the street for some time before the plaintiff arrived to superintend the weighing. It was held that he could recover compensation for the shrinkage in weight of the cattle caused thereby. In *Western U. T. Co. v. Bertram*,(b) the plaintiff sent this message: "Cancel order given yesterday." The order was for the purchase of goods. It was held that the measure of damages for failure to transmit was the difference between the price at which the goods had been ordered and that for which the plaintiff could have secured them elsewhere.

§ 880. Notice.—The question whether the company had notice of the consequences of negligent transmission has, in most cases, been passed upon by the court. Thus in *Stevenson v. Montreal T. Co.*(c) the message "sell 1500 bbls." was delayed; the court held that there was no notice of the urgency of the message, and therefore that consequential damages could not be recovered for delay in transmission. In *Pope v. Western U. T. Co.*(d) it was said to be for the jury. The true rule would seem to be that whether the message itself contains enough to notify the company of its importance is a question for the court, since it arises on the interpretation of the contract; but if the plaintiff seeks to prove notice to the company outside the message, it is a question for the jury.

Sprague v. The Western Union Tel. Co.(e) is a good

(*) 115 Ind. 191.

(b) 1 Tex. App. Civ. 1152.

(c) 16 Up. Can. Q. B. 530; All. Tel. Cas. 71.

(d) 14 Bradw. 531.

(e) 6 Daly 200.

illustration of the difficulty of applying the rule of damages within the contemplation of the parties to telegraph cases. The suit was contract for non-transmission of a dispatch to an attorney at Buffalo: "Hold my case till Tuesday or Thursday. Please reply." The operator was told that the message was about a cause in Buffalo that was expected to be called, that it was of great importance to the party sending to get a reply the next day in order that he might know when to go to Buffalo. Not receiving any reply, plaintiff went to Buffalo with his counsel, the journey proving useless, as the cause had been put off. This put the plaintiff to an expense of \$60 for travelling expenses and \$250 for counsel fee. The court held that with the knowledge possessed by the defendants, they were bound to infer that such might be the consequences of their neglect. But Daly, J., dissented on the ground that such an inference was not natural.

§ 881. **Consequential loss.**—Subject to the limitations just stated, the plaintiff may recover compensation for such consequential loss as is the proximate consequence of the company's negligence. Thus, upon the non-delivery of a message offering to employ the plaintiff at \$2 a day the court at the trial charged that the plaintiff could recover damages at the rate of \$2 a day, subject to deduction for employment that the plaintiff found or should have found; and the charge was sustained.^(a) The defendant gave the plaintiff a wrong quotation of the price of gold, and the plaintiff, in reliance upon the quotation given him, bought foreign exchange; it was held that he could recover his actual loss on account of the purchase.^(b) The plaintiff, a manufacturer, telegraphed an order for iron, but the telegram was not delivered. It was

^(a) *Western U. T. Co. v. McKibben*, 114 Ind. 511.

^(b) *Bank of New Orleans v. Western U. T. Co.*, 27 La. Ann. 49.

held that he could recover the expense of hire of workmen and the other expenses of delay while waiting for the iron.^(*)

§ 882. **Commercial messages—Loss of intended purchase.**—Where the telegraph company negligently omitted to deliver to the plaintiff the following message, "Ship oil as soon as possible at the very best rates you can," it was held by the Supreme Court of Colorado, that the profits which the sender might have made upon the oil could not be recovered, but that the measure of damages included, besides the cost of the dispatch, all expenses incurred by the plaintiff by reason of the defendant's failure to fulfil the contract, among which was the increased price of freight he had to pay.^(b) It may be observed, in regard to the foregoing case, that while it disallows the recovery of profits, it cites with approval the cases of *Squire v. Western U. T. Co.*,^(c) and *Leonard v. New York, A. & B. E. M. T. Co.*,^(d) in both of which a recovery of the loss in market value was allowed. In these the recovery was necessary to indemnify the plaintiff without giving him a profit. But both cite as authority those decisions, in actions against carriers on the ground of negligent delay,^(e) in which a recovery is allowed of the difference in market value of the retarded goods lost at the place of their *destination*. This necessarily includes the shipper's or consignee's profit. We think that, by analogy, the recovery in corresponding cases against the telegraph company, where it has become liable on the ground of negligence, should include

(*) *Reliance L. Co. v. Western U. T. Co.*, 58 Tex. 394.

(b) *Western U. T. Co. v. Graham*, 1 Col. 230.

(c) 98 Mass. 232.

(d) 41 N. Y. 544.

(e) Such as *Cutting v. Grand T. Ry. Co.*, 13 All. 381. See § 854.

the loss in market value, even where the making good of this loss imports an actual profit. And by the almost uniform current of authority compensation is allowed for the loss of the proposed purchase.^(*) In *True v. International T. Co.*,^(b) the message was as follows: "Ship cargo named at 90 if you can secure freight at 10." The message was one accepting an offer to sell the plaintiff some corn. The defendant failed to send the message. It was held that the plaintiff could recover the difference between the price named and that which he would have been obliged to pay after notice of the failure of the telegram to purchase the like quantity and quality of corn. In *Squire v. Western U. T. Co.*^(c) the message was: "Will take your hogs at your offer." For a delay in delivering the message the company was held liable for the difference between the contract price and the price the plaintiff was obliged to pay for the same thing at the same time and place. In *Manville v. Western U. T. Co.*^(d) the plaintiff's agent sent a message: "Ship your hogs at once." Defendant delayed the message. It was held that the measure of damages was the difference between the market price on the day they were delivered and on the day they would have been delivered but for the delay. In *Mowry v. Western U. T. Co.*^(e) the plaintiff sent a message to complete the purchase of two car-loads of hams. The message was delayed by the defendant, and the price of hams rose before it was delivered. It was held that the plaintiff could recover the difference between the price of the hams when the message was de-

(*) So in case of the acceptance of an offer of land. *Alexander v. Western U. T. Co.*, 66 Miss. 161.

(b) 60 Me. 9; *acc.* *Pennington v. Western U. T. Co.*, 67 Ia. 631.

(c) 98 Mass. 232.

(d) 37 Ia. 214.

(e) 51 Hun 126.

livered and the price when it should have been delivered. In the case of the *United States T. Co. v. Wenger*,^(*) the message was a direction to buy stock at a limit mentioned in the telegram. The court held, that as the company through gross negligence did not transmit the message, and the stock was, therefore, not purchased till after a delay, and the message disclosed to the company's agents its nature, the measure of damages was the rise in the price of the stock between the time when it ought to have arrived and the time when the purchase was made.

In the case of *Rittenhouse v. Independent Line of Telegraph*,^(b) owing to the defendant's mistake in changing the wording of a dispatch transmitted by it from the plaintiffs in Washington to their brokers in New York, the brokers bought at the morning board of brokers in the latter city five hundred shares of Michigan Southern Railroad stock, instead of selling such amount of that stock as the plaintiffs then had on hand, and buying at that board five hundred shares of Hudson River Railroad stock; the plaintiffs, on discovering the defendant's mistake, corrected it by repeating the dispatch, which, in its right form, was not received till after the morning board had adjourned. On receiving it thus corrected, the brokers sold the five hundred shares of Michigan Southern and bought the Hudson River stock "on the street." The former were sold for the best price then obtainable, but less by \$475 than they had to pay for them. The brokers also bought on the street five hundred shares of Hudson River stock, at a price exceeding by \$1,750 the lowest price at which they could have been bought had the message been correctly re-

(*) 55 Pa. 262.

(b) 1 Daly 474; affirmed 44 N. Y. 263.

ceived in due time, and by \$1,375 the average price of the morning board. The case having been tried before the court without a jury, judgment was given for the latter sum, and on appeal to the General Term sustained, the court holding in reference to the loss on the sale of the five hundred shares of Michigan Southern stock, that the shares of that stock first purchased were in legal effect bought for the defendant's account. The company not having been notified beforehand of the intended sale, could not be held for this portion of the loss. From this judgment the defendant appealed to the Commission of Appeals, where the judgment was affirmed.

§ 883. *Loss of intended sale.*—A telegram directing a sale of the plaintiff's cotton was not transmitted. Before the failure to send the message was discovered, the price of cotton fell in the market. It was held that the plaintiff could recover the difference between the market value of his cotton at the time the message should have been delivered and at a reasonable time after the omission to transmit had been discovered.^(*) In *Kinghorne v. Montreal T. Co.*^(b) the plaintiff, having received a note saying "we will pay 80c. for rye" sent a message by the defendant to this effect: "Accept: ship to-morrow 1500 or 2000." The message was not sent, and the sale fell through. It was held that there could be no recovery, for the contract as shown was uncertain as to the amount ordered. On the other hand in *Wisconsin*, for delay in transmitting the following telegram: "Send bay horse to-day. Mock loads to-night"; Mock being a well-known buyer and shipper, whereby a sale was lost, the company was held liable for the loss.^(c) Where a telegram accepted an

(*) *Daughtery v. American U. T. Co.*, 75 Ala. 168.

(b) 18 Up. Can. Q. B. 60; Allen Tel. Cas. 98.

(c) *Thompson v. West. U. T. Co.*, 64 Wis. 531.

offer to *purchase and sell* certain cotton futures for the plaintiff, and the bargain would have been advantageous in part, and in part not so, the measure of damages for failure to transmit is the *net* profit lost. (*)

In an unreported case in New York, damages were claimed to have been sustained by the plaintiff from the defendant's failure to transmit a telegram from New York to St. Louis, instructing one D. L. Davison "to sell silver lepinés for \$10 ; also others for less." The dispatch was not sent, and owing to the fluctuation in the price of gold, which was at a premium, there was a considerable decline in the market before the arrival of a letter from the plaintiff at St. Louis, containing the same instructions with the dispatch. The plaintiff contended that the rule of damages was the difference between the market price of the watches at the time when the dispatch should have been delivered and that when the letter was received. The defendant's counsel insisted that these damages were too remote, and that the company were not informed by the purport of the dispatch or otherwise, that it had a pecuniary value, or what would or might be the nature and extent of a loss from its non-delivery, and that they had entered into no engagement based upon the condition of the gold market, and had not assumed the risk of a fall in gold, nor even been apprised what the consequence of one would be. But the presiding judge (Jones, J.) denied a motion for a nonsuit on these grounds, and held that the company were bound to exercise due diligence and care in the conduct of their business, without being notified of the specific pecuniary value of any dispatch left with them. They were bound to infer that the dispatch was of importance, and might be of pecuniary value to the persons sending and receiving it ; and the damages

(*) *Western U. T. Co. v. Way*, 83 Ala. 542.

should be measured by the decline in gold, which made the difference in the market value.^(*)

When the message is in form a mere statement of a sale of an article of commerce, it has been treated as disclosing nothing.^(b) Certainly such a message does not apprise the company of the probable consequence in the same way that an order to buy does, but to say the least such a message is the one usually sent *in reply* to an order to sell, in which case the consequences of error are easily foreseen.

§ 884. Error in transmitting amount of goods.—In the case of the New York & Washington Printing Telegraph Co. v. Dryburg,^(c) the agent of the company, who received a message directing the purchase of two hand bouquets, erroneously supposing the word “hand” to be “hund.” and to stand for “hundred,” delivered it thus altered. The Supreme Court of Pennsylvania, in an action on the case brought by the receiver of the message, held that “though telegraph companies are not like carriers, insurers for the safe delivery of what may be intrusted them, their obligations, as far as they reach, spring from the same sources—namely, the public nature of their employment and the contract under which the particular duty is assumed”; and that one of the plainest of these obligations was to transmit the very message prescribed. And a verdict for the loss and expense sustained by the florist in cutting and procuring a large number of flowers to fulfil the order, was sustained.

Through the carelessness of a telegraphic operator, the following dispatch, transmitted from Chicago to Oswego, “Send five thousand sacks of salt immediately,” was tran-

(*) *Strasburger v. West. U. Tel. Co.*, N. Y. Super. Court, April, 1867.

(b) *Hord v. W. U. T. Co.*, 3 Cin. Law Bulletin 147.

(c) 35 Pa. 298.

scribed so as to read, "Send five thousand casks of salt immediately." The term "sack" at the time designated a package of fine salt, weighing about 14 pounds, and the term "cask" a package of coarse salt of about 320 pounds. In an action against the telegraph company for damages arising from the mistake, the measure of damages was held to be the difference between the market value at Oswego and that at Chicago (which was less), together with the cost of transportation from Oswego to Chicago.^(*) This case was followed in *Tyler v. Western U. T. Co.*^(b) In that case the plaintiff sent a message, "sell 100 shares Western Union." The message as delivered read "sell 1,000 shares Western Union." The plaintiff had on hand with the party to whom the message was sent 100 shares, and to replace the others, 900 shares were bought on a rising market. The advance in price was held to be the measure of damages. And so where a message ordering the purchase of 1,000 shares was changed to 100 shares by the negligence of the defendant, the measure of damages was the increase in value of 900 shares from the time the 100 shares were bought to such reasonable time after notice of the mistake as was necessary for securing the remaining 900 shares.^(c)

In the case of *Washington & N. O. T. Co. v. Hobson*^(d) the plaintiffs below had delivered to the company a message to be transmitted to the plaintiffs' factors at New Orleans, instructing them to buy five hundred bales of cotton, which number by the company's fault was altered to twenty-five hundred, and the factors, under this misinformation, purchased two thousand and seventy-eight

(*) *Leonard v. New York, A. & B. E. M. T. Co.*, 41 N. Y. 544.

(b) 60 Ill. 421.

(c) *Marr v. W. U. T. Co.*, 85 Tenn. 529.

(d) 15 Gratt. 122.

bales before the mistake was discovered. It was held that if the company were liable for the damages arising from the alteration of the message, the measure of these was what was lost on the sale at Mobile of the excess of the cotton above that ordered, or if it were sold elsewhere, what would have been the loss on it if sold at Mobile in the condition and circumstances in which it was when the mistake was discovered, and that the regular commission of the factors in the purchase should be included in the damages.

§ 885. In transmitting price.—A telegraph company contracted to furnish the plaintiff with daily reports of the grain market in Chicago. The plaintiff had a contract to deliver grain at \$1.32. On one day the defendant reported the price at \$1.21½. In fact the price was \$1.50; and, under the plaintiff's orders to purchase 5,000 bushels, they were bought at \$1.50. Soon after the price dropped to \$1.12½. It was held the plaintiff could recover the difference between \$1.50 and \$1.21½—that the fact that the plaintiff wanted reports of the Chicago market was sufficient to notify the defendant that he dealt in that market, and that fact must be presumed to have been in the contemplation of the parties in making the contract.^(*) In the case of *De Rutte v. New York A. & B. T. Co.*^(b) it appeared that in the transmission of a dispatch directing the purchase of wheat at the limit of twenty-two francs the hectolitre, by the defendant's mistake the number 22 was changed to 25, in consequence of which the wheat was purchased at what proved, on a sale of it made by the plaintiff on discovering the error, a loss of more than \$2,000. The court held this loss to be the direct and immediate consequence

^(*) *Turner v. Hawkeye T. Co.*, 41 Ia. 458.

^(b) 1 Daly 547.

of a breach of the contract of transmission, and to furnish the measure of the plaintiff's damages.

The plaintiff telegraphed to a third party an offer to sell grain at \$1.50; the defendant, in transmitting the message, changed the price to \$1.05, and the offer in that form was accepted. The plaintiff bought grain at \$1.45 to fill his supposed contract; it was held that the loss he suffered thereby must be compensated by the defendant.^(*) In a similar case in Georgia^(b) the court held that the plaintiff was bound to fulfil the agreement which the company had made in his name, and therefore that the measure of damages was the difference between the price named by the defendant and the market price at the time of delivery, that is, the actual loss of the plaintiff in filling the contract. The case has been disapproved on the ground that the company is not the plaintiff's agent to make an offer, and the plaintiff was properly restricted, as in the former case, to his actual loss by the contract falling through.^(c)

§ 886. In transmitting conditions of purchase or sale.— An offer to sell salt to the plaintiff at a certain price, delivered "at our city wharf" was changed by the defendant in transmission to read "at your city wharf." The company was held liable to the plaintiff (who accepted the offer) for the cost of transportation between the seller's and the plaintiff's city wharves.^(d) So where by an error in transmitting a dispatch, the goods of the plaintiff were sent to the wrong place, the measure of damages is the difference in value at the two places, or the expense

(*) *Western U. T. Co. v. Griswold*, 37 Oh. St. 301.

(b) *Western U. T. Co. v. Shotter*, 71 Ga. 760.

(c) *Pepper v. Telegraph Co.*, 87 Tenn. 554.

(d) *Seiler v. Western U. T. Co.*, 3 Amer. L. Rev. 777.

of getting to the right place.^(*) The plaintiff telegraphed to his agent "if gold bill is vetoed, buy \$100,000." The defendant omitted the word "if" in transmitting the message; the agent bought the gold, and sold it at a loss as soon as the mistake was discovered. It was held that the company was liable for the amount of the loss.^(b)

§ 887. **Loss of a debt.**—In the case of *Parks v. Alta C. T. Co.*^(c) the telegraph company undertook to transmit a message in the following words: "Due 1800. Attach if you can find property. Will send note by tomorrow's stage." Owing, as appeared, to the company's delay in forwarding the dispatch till the following day, the debtor's property was all seized under intervening process, and the plaintiff could attach nothing. It was held that the company was liable for the amount of the debt, the loss of which was considered to be the natural and proximate damage resulting from its breach of contract. The same measure was applied under similar circumstances, in the case of *Bryant v. The American T. Co.*^(d) In this case, one of the plaintiffs had learned at a quarter past four o'clock in the afternoon, that a firm in Providence, Rhode Island, of which one Bennett was a member, and which owed them \$12,000, was insolvent, and that Bennett, who had been temporarily in New York, had left for Providence by that afternoon's train. They thereupon directed their attorney to send a dispatch to Providence to have Bennett's house and lot at-

^(*) *Western U. T. Co. v. Reid*, 83 Ga. 401. The latter rule, presumably, only if less than the difference in value.

^(b) *Smith v. Independent Line of Telegraph, Scott & J., Tel.*, 399 n.; *Allen Tel. Cas.* 662 n.

^(c) 13 Cal. 422.

^(d) 1 Daly 575.

tached for his debt. The attorney accordingly, at half-past eight o'clock in the evening, left a message to that effect at the defendant's office in New York, addressed to Mr. Payne, an attorney in Providence. By the laws of Rhode Island, the attachment could be made only when Bennett was out of the State. At the time of leaving the message, the attorney explained to the defendant's clerk that its object was to get an attachment on property, and that it would do no good unless delivered in time for the attachment to be made before the train on which Bennett was, should enter Rhode Island. The attorney paid for the dispatch, and offered to pay any further expense necessary to send it at once. The clerk agreed to send it promptly, and it was dispatched at ten minutes past nine and received by the operator in Providence at half-past nine, with a direction to send it in haste. At the time of its receipt he was engaged in receiving reports for the press, which by statute were entitled to precedence over all other matters, and replied that it could not be sent that night, as the delivery boy had gone home. The New York operator rejoined that it must be delivered, to which the other then signified his assent. The newspaper reports continued uninterruptedly until half-past eleven o'clock, when, an interval occurring, the Providence operator had the dispatch copied, and procured a chance messenger to deliver it, which was done a few minutes after. By the time the attorney was aroused from his bed and the dispatch delivered to him, it was too late to effect the attachment before Bennett's arrival in the State. He went into bankruptcy the next day, and the plaintiffs obtained but \$500 from his estate. The house and lot were worth over \$12,000. Considering that there was gross negligence in the want of promptness in delivering the mes-

sage at Providence, a majority of the court held that the company was liable, and that the measure of damages was the amount of the debt with interest from the day of delivery of the message, less the \$500 collected. Daly, First Judge, dissented in a carefully considered opinion, on grounds of which the following is a summary statement. Notwithstanding the explanation of the message to the defendant's clerk, the defendant having been under no obligation to assume so great a risk, could not, under the circumstances, with this imperfect information, have intended to do so for so trivial a compensation as the price of the dispatch, even assuming the New York clerk to have had the authority necessary to bind the company to this extent. The company was not advised of the exact circumstances making diligence peculiarly necessary. It was not informed that the firm of which the plaintiff's debtor was a member was insolvent, that his house was unincumbered, nor that it was of value enough to pay the debt, nor could it be presumed to know how much time was necessary to make the attachment, nor its precise legal effect. The loss was too remote and contingent a result of the defendant's delay to impose so heavy a liability, and the plaintiffs themselves, with full knowledge of the facts, "had not been especially diligent." The learned judge observed also that the plaintiff's debt had not been extinguished, and that although the debtors were then insolvent, they might become able and be compelled to pay the debt within the period during which it would continue as an obligation against them. Citing with approbation the case of *Landsberger v. The Magnetic Telegraph Co.*,^(*) he held that the measure of the plaintiffs' damages should be confined to the expense sustained by them in the

(*) 32 Barb. 530, *supra*.

transmission of the dispatch. The decision was reversed by the Court of Appeals on technical grounds, without considering the merits. So where the defendant received the message, "you had better come and attend to your claim at once," to be transmitted to the plaintiff, a creditor, and the message was not delivered, and on account of the plaintiff's absence he was able to recover nothing, it was held that the plaintiff was entitled to recover the amount of the claim.^(*)

§ 888. *Speculative loss.*—The plaintiff must of course prove that the loss for which he seeks compensation would have happened; compensation will not be given for mere conjectural consequences. So where the plaintiff, a broker, telegraphed the price at which he could sell his principal's goods, and the message was not delivered, it was held that it was entirely conjectural whether the owner would have sold at that price, and therefore that the plaintiff could not recover his expected commissions.^(b)

In *Hibbard v. Western Union Telegraph Co.*^(c) a telegram was sent by Hibbard to his agent, directing him to buy goods at a certain price, deliverable in June at the seller's option. The message was not delivered, and the price the next day went up; after that it went down, and continued below the price mentioned in the telegram until after the period fixed for delivery. The agent did not buy the goods. It was held that only nominal damages could be recovered, as the plaintiff could only have made any profit by selling the day after the purchase was made, and it was impossible to say that he would have done this—it depended upon too many contingencies. So where

(*) *Western U. T. Co. v. Sheffield*, 71 Tex. 570.

(b) *McColl v. Western U. T. Co.*, 44 N. Y. Super. Ct. 487.

(c) 33 Wis. 558.

the plaintiff telegraphed to a broker to buy oil on a margin, and the message was not delivered, it was held that the loss of the plaintiff was too uncertain for compensation, though the price of oil afterwards fluctuated.^(*) Where the plaintiff, an undertaker, failed to receive a message, "Meet me at the depot, prepared to arrange for shipment to I. of my mother-in-law's remains," it was held that since he lost only the possibility of making a profit, he could not recover.^(b) In *Western U. T. Co. v. Connelly* ^(c) a message to the plaintiff in these words, "if you want a place, come first train," was delayed; and upon going to the place designated the plaintiff found himself too late. It was held that he might recover compensation for his time and expenses in going to the place, but that loss from failure to secure employment was too conjectural.

§ 889. *Uncertain profits not recoverable.*—In many cases where a telegram is delayed or not delivered, it is impossible to prove that a bargain has been lost; because it does not appear that had the message been duly transmitted, an actual gain would have ensued.^(d) The whole subject has been recently reviewed in its bearing on the contracts of telegraph companies by the Supreme Court of the United States. In *Western Union Tel. Co. v. Hall*,^(e) the message was: "Buy ten thousand if you think it safe. Wire me." The message meant that the person to whom it was addressed should buy ten thousand barrels of petroleum, if he thought it safe. Had it been delivered in time, the purchase would have been

^(*) *Kiley v. Western U. T. Co.*, 39 Hun 158.

^(b) *Clay v. Western U. T. Co.*, 81 Ga. 285.

^(c) 2 Tex. App. Civ. 113.

^(d) *Cannon v. W. U. Tel. Co.*, 100 N. C. 300.

^(e) 124 U. S. 444, 454.

made at \$1.17 per barrel. On the actual delivery of the dispatch the price had risen to \$1.35, and no purchase was made. The court held that the plaintiff could recover only nominal damages. Matthews, J., in delivering the opinion, said :

“ If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not, or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory, then, on which the plaintiff could show actual damage or loss is on the supposition that, if he had bought on the 9th of November, he might and would have sold on the 10th. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

“ It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place.”

And the learned judge distinguished this from cases in which profits have been allowed as follows :

“ Such was the case of *United States Telegraph Co. v. Wenger*.^(*) There the message ordered a purchase of stock, which

(*) 55 Pa. 262.

advanced in price between the time the message should have arrived and the time when it was purchased under another order, and the advance was held to be the measure of damages. There was an actual loss, because there was an actual purchase at a higher price than the party would have been compelled to pay if the message had been promptly delivered, and the circumstances were such as to constitute notice to the company of the necessity for prompt delivery. The rule was similarly applied in *Squire v. Western Union Telegraph Co.*^(*) There the defendant negligently delayed the delivery of a message accepting an offer to sell certain goods at a certain place for a certain price, whereby the plaintiff lost the bargain, which would have been closed by a prompt delivery of the message. It was held that the plaintiff was entitled to recover, as compensation for his loss, the amount of the difference between the price which he agreed to pay for the merchandise by the message, which if it had been duly delivered would have closed the contract, and the sum which he would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased a like quality and quantity of the same species of merchandise. There the direct consequence and result of the delay in the transmission of the message was the loss of a contract which, if the message had been duly delivered, would by that act have been completed. The loss of the contract was, therefore, the direct result of the defendant's negligence, and the value of that contract consisted in the difference between the contract price and the market price of its subject-matter at the time and place when and where it would have been made. The case of *True v. International Telegraph Co.*^(*) cannot be distinguished in its circumstances from the case in Massachusetts, and was governed in its decision by the same rule. The cases of *Manville v. Telegraph Co.*,^(*) and of *Thompson v. Telegraph Co.*^(*) were instances of the application of the same rule to similar circumstances, the difference being merely that in these the damage consisted in the loss of a sale instead of a purchase of property, which was prevented by the negligence of the defendant in the delivery of

(*) 98 Mass. 232.

(*) 60 Me. 9.

(*) 37 Ia. 214, 220.

(*) 64 Wis. 531.

the messages. In these cases the plaintiffs were held to be entitled to recover the losses in the market value of the property occasioned, which occurred during the delay.

"Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts, in the purchase or sale of property, the actual loss based upon changes in market value are clearly within the rule for estimating damages. Of this class examples are to be found in the cases of *Turner v. Hawkeye Telegraph Co.*,^(*) and *Rittenhouse v. Independent Line of Telegraph*,^(*) but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore for which he is entitled to recover, is the cost of transmitting the delayed message."

§ 890. Messages not understood—Cipher messages.—Where a message cannot be understood by the company's agents it is usually held that consequential damages cannot be recovered. Thus in *Shields v. Washington T. Co.*^(*) Buchanan, J., charged the jury that for negligence in transmitting the message, "oats 56, bran 1-10, corn 73, hay 25," no more than the price of the message could be recovered. And it is, therefore, law in most jurisdictions that for the wrongful transmission of a *cipher* message

(*) 41 Ia. 458.

(*) 44 N. Y. 263.

(*) Allen Tel. Cas. 5; 9 Western L. Jour. 283.

consequential damages cannot be recovered.^(*) In the leading case in this country a telegram was sent in cipher by the plaintiff to his agents, directing them to buy a certain amount of stock. The telegram was delayed, and the price rose. It was held that he could only recover nominal damages. The defendant not knowing what was in the telegram, no damages could be said to have been in the contemplation of the parties. To have held the company liable, its agent should have known the contents, and the fact and extent of the plaintiff's liability to loss in case of mistake.^(b) In *Mackay v. W. U. Tel. Co.*^(c) it was held by the Supreme Court of Nevada that the measure of damages for breach of the contract to deliver a cipher dispatch was the money paid for its transmission. The ground of the decision was that such were the only damages in the contemplation of the parties. In *Sanders v. Stuart*,^(d) Lord Coleridge, C. J., said :

"The plaintiffs in this case were merchants in this country; the defendant a person who made his living by collecting messages and delivering them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message, in words by themselves, entirely unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendant, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction.

"The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain

(*) *Western U. T. Co. v. Martin*, 9 Bradw. 587; *Cannon v. Western U. T. Co.* 100 N. C. 300; *Daniel v. Western U. T. Co.*, 61 Tex. 452.

(b) *Candee v. Western U. T. Co.*, 34 Wis. 471.

(c) 16 Nev. 222.

(d) 1 C. P. D. 326.

the verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in *Hadley v. Baxendale*,^(*) and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in *Hadley v. Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damage as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it,' for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz. : the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also ; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach' of such a contract as this. No rule as to damages which is to be found in any of the cases, or in the books of Mr. Sedgwick and Mr. Mayne, will avail the plaintiffs in this case ; and the cases cited to us from the American courts in which the liabilities of common carriers have been imposed on telegraph companies in America, even if correct with regard to telegraph companies, have no application to a case where the defendant is not a telegraph company, but a collector of messages to be transmitted by such a company, and the negligence complained of is his negligence and not the negligence of a company. We think, therefore, that the rule should be absolute to reduce the damages to a nominal sum."^(†)

^(*) 9 Ex. 341.

^(†) In *Western U. Tel. Co. v. Fontaine*, 58 Ga. 433, it was held that plaintiff could recover, for failure to deliver the following message : "Exercise your own discretion as regards covering December contract," damages sustained

§ 891. **Authorities extending liability—Direct loss.**—There are, however, a good many courts which hold telegraph companies to strict accountability for the results of their negligence, whether or not the result was known by the company to be probable. These courts do not, as suggested in the earlier cases, reach this decision by holding the company to the liability of a common carrier; on the contrary, the difference is insisted upon. The argument generally adopted is that the mere use of the telegraph shows the message to be important, and loss more than likely to result from mistake or delay, and that the company, accepting the message to transmit under such circumstances, has no ground of complaint if it is held liable to compensate for such consequences at least as might have been foreseen if the message had been understood, if not for all consequences which were proximate. In *Western U. T. Co. v. Blanchard* (*) the message was "cover 200 Sept. 100 Aug." The message was transmitted "200 Aug." It was held that the consequent loss could be compensated, the court saying, "There was at least enough known to show it was a commercial message of value attached to the message, and that is sufficient." This case stretches the ordinary rule of damages within the contemplation of the parties to its utmost limits. It was shown that the message was intelligible in the cotton trade. (b) To the telegraph company the difference

in sale of his cotton. There was no discussion of the measure of damages, the case turning on the question of liability, and it being held that defendant was not a common carrier, but ordinary bailee for hire. From the very inadequate report of the charge to the jury in the case of *Booz v. W. U. Tel. Co.*, 7 Abb. N. C. 161, it would seem to fall in that class of cases in which relief is denied on account of the unintelligible character of the message. A charge to the same effect was given in *Behm v. W. U. T. Co.*, 8 Biss. 131.

(*) 68 Ga. 299, 310.

(b) In several cases, in order to allow a recovery, the courts seem to have imputed to the company a knowledge of technical terms, which a telegraph

between such a message and a cipher dispatch must be very slight. And such is the view which the court now seems to take of the case.^(a) In accordance with this doctrine, it has been held in a number of later cases that substantial damages may be recovered for negligence in transmitting a cipher message.^(b) In *Western U. T. Co. v. Hyer* ^(c) *McWhorter, C. J.*, said :

“The larger part of all messages sent are of a commercial or business nature which suggest value; the requirements of friendship or pleasure can await other means of less celerity and less expense. If this be true, why should the law assume that as a rule all messages sent over it are unimportant, and that an important one is an exception, of which the operator is to be informed? . . . The common carrier charges different rates of freight for different articles according to their bulk and value and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission, that he was to use any extra degree of skill, any different method or agency for sending

company, as such, can hardly have. Why should it be charged with a knowledge of the nature of “Lepines,” or the difference between salt in sacks and salt in casks? To say that the rule of the contemplation of the parties applies to such a case, is often to assume as a fact something which has no existence.

^(a) *West. U. Tel. Co. v. Fatman*, 73 Ga. 285.

^(b) *Daughtery v. American U. T. Co.*, 75 Ala. 168; *Western U. T. Co. v. Hyer*, 22 Fla. 637; *Western U. T. Co. v. Fatman*, 73 Ga. 285; *Pinckney v. Western U. T. Co.*, 19 S. C. 71, 74 (*semble*); *Western U. T. Co. v. Weiting*, 1 Tex. App. Civ. 801. In California it seems to be assumed that such is the law. *Hart v. Western U. T. Co.*, 66 Cal. 579.

^(c) 22 Fla. 637, 645.

it, from the time, the skill used, the agencies employed, or the compensation demanded, for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which in consideration thereof he had agreed to perform, and which the law in consideration of his promise and the reception of the consideration therefor had already enjoined on him."

In *Daughtery v. Am. Un. Tel. Co.*,^(*) an action of assumpsit for non-delivery of a cipher message, it was held by the Supreme Court of Alabama, on a full consideration of the authorities, that the defendant's ignorance of the contents of the dispatch was no excuse, and that the plaintiff was entitled to recover as damages the whole profit he would have made on a sale ordered by it. The principal ground of the decision seems to be that substantial damages were the natural result of such a breach of contract; that the second branch of the rule in *Hadley v. Baxendale*, if it was intended to restrict the first, and to mean that such damages are only natural as are in contemplation of the parties, was misleading and erroneous, and that at any rate it could not be applied to transactions in which the same measure of diligence is required, without regard to the quantum of interest to be affected by it.^(b) In Virginia the court, partly by interpretation of a statute making it imperative on a telegraph company to transmit promptly any message offered it, and partly, it would appear, on general principles,

(*) 75 Ala. 168; approved and followed in *Western U. T. Co. v. Way*, 83 Ala. 542.

(b) We cannot too often reaffirm our belief that the result of all the best considered cases under *Hadley v. Baxendale* is that that case introduced no new rule of law.

reached the same conclusion.^(*) There was nothing in the statute to affect the rule of damages.^(b)

§ 892. What is the direct loss.—It has been held in some cases that the *direct loss* from failure to transmit a telegraphic dispatch is the sum paid to the company for the transmission. But this cannot be regarded as the true view. The telegraph company makes a contract with the sender to transmit information from one point to another; for this purpose it is chartered, and this it holds itself out to the public as offering to do. The sum paid for transmission is the consideration for this contract, and upon the general principles of damages in actions of contract it is not to be considered in measuring the damages. The direct loss, as in all cases of breach of contract, is the value of the contract. If the contract had been performed, the receiver would have had the information, which he now lacks. The value of the contract, then, is the value of the information transmitted.

This will clearly appear in a simple case. Suppose A. employs B. as his agent and sends him to a broker to buy 1,000 barrels of oil for delivery the next day. B. through mistake orders only 100 barrels. The price of oil rises before the time for delivery. A.'s loss is not the remuneration paid to the agent, but the value to A. of that part of the order which B. failed to transmit, that is, the rise in value of 900 barrels of oil between the time of purchase and the time of delivery. This is the direct loss of B.'s breach of contract. A telegraph company enters into a contract of agency with the sender, very

(*) *Western U. T. Co. v. Reynolds*, 77 Va. 173. The point was noticed but not decided in Wisconsin, where a similar statute is in force: *Cutts v. Western U. T. Co.*, 71 Wis. 46.

(b) See dissenting opinion of Lewis, P., at p. 192.

similar to the contract of B. with A. in the case supposed. The mere fact that the information is transmitted over a wire can make no difference.

In the form in which it is claimed, the loss caused by failure to transmit a dispatch is usually consequential; but the information contained in a dispatch would seem to have an inherent value which in most cases might easily be proved; and this value on principle is the direct loss of the sender, or person who has the right to sue. It is not meant by what is here said that the cases can all be reconciled in accordance with this view; but all those in which the loss caused by cipher dispatches has been allowed, could be rested upon it. It has been already shown that a common carrier is held bound for any direct damages, as for the contents of packages however valuable.^(*) It is only in the case of consequential losses that the rule of *Hadley v. Baxendale* is generally applied. If the cases holding telegraph companies responsible for cipher dispatches are correctly decided, they might be rested on the right to recover direct damages, which would be more satisfactory than vague considerations of public policy, which are more proper for legislative than for judicial consideration. But it must be said that these cases are at present of only local authority, and opposed to the general current of decision. It is to be noted that the rule holding telegraph companies liable for the direct loss caused by cipher dispatches would not make them insurers or common carriers, for that is a question of liability, not of the measure of damages. It makes them liable to precisely the same extent that, according to general rules, they would be liable if the message had been put in intelligible language.

(*) *Little v. Boston & M. R.R.*, 66 Me. 239.

In *Strause v. Western Union Tel. Co.*^(*) plaintiffs, who were bankers, had presented to them a bill purporting to be drawn by a bank at Peru. They telegraphed the bank inquiring if the draft was genuine, in answer to which a dispatch was sent saying that it was not. Through the carelessness of defendants' messenger, a forged dispatch was substituted for this one, saying that the bill was correct, and on delivery of this forged message, plaintiff cashed the draft. On these facts it was held by Gresham, J., that the defendant was liable in tort for the whole amount, and that it made no difference that the plaintiffs had another remedy in contract on a genuine indorsement.^(b)

§ 893. Price of the message—Nominal damages.—It should be noticed, in connection with these cipher dispatch cases, that the right to recover nominal damages and the right to recover the price of the message are not the same. If the plaintiff is limited to the price of the message, it is not on the ground that he is entitled to nominal damages; but that the only substantial loss that he can prove is the money paid out. He must always lose at least this, in cases where an action will lie, unless the message has not been prepaid.

(*) 8 Biss. 104.

(b) In such a case, the action being in tort, there is no question of the application of the rule relating to damages contemplated. But if the cause of the loss had been negligence in transmission, according to those authorities which hold the knowledge by the company of the circumstances to be essential, the rule might have been very different. The dispatch was that the bank had drawn "no such bill." Suppose by innocent mistake the word "no" had been omitted, and the inquiry had been in cipher, so that the company could not have understood the purport of the answer, or the act which it was calculated to lead the plaintiffs to do, according to many courts, the extent of recovery would have been the price of the message. Should such a trivial difference as this alter the measure of damages?

§ 894. *Mental suffering.*—It has been held in many cases that where a message notifying the plaintiff of the death or severe illness of a near relative is not delivered, the telegraph company is liable to compensate the plaintiff for the mental suffering caused thereby.^(a) So in *Wadsworth v. Western U. T. Co.*,^(b) Caldwell, J., said (p. 705) :

“To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default, would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contract broken ; and, furthermore, such a holding would justify the conclusion that the defendant might, with impunity, have refused to receive and transmit such messages at all ; and that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result we think no court should submit. The telegraph company is the servant rather than the master of its patrons. It is their prerogative to determine what messages they will present, and so they are lawful it is bound by law, upon payment of its toll, to transmit and deliver them correctly and promptly. It has no right to say what is important and what is not, what will be profitable to the receiver and what will not, what has a pecuniary value and what has not ; but its single and plain duty is to make the transmission and delivery with promptitude and accuracy. When that is done its responsibility is ended ; when it is omitted through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse—one or both—subject alone to the proviso that the injury be the natural and direct consequence of the negligent act.”

^(a) *Beasley v. Western U. T. Co.*, 39 Fed. Rep. 181 ; *Reese v. Western U. T. Co.*, 123 Ind. 294 ; *Chapman v. Western U. T. Co.*, 13 S. W. Rep. 880 (Ky.) ; *Young v. Western U. T. Co.*, 11 S. E. Rep. 1044 (N. C.) ; *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695 ; *So Relle v. Western U. T. Co.*, 55 Tex. 308 ; *Stuart v. Western U. T. Co.*, 66 Tex. 580. *Contra*, *Russell v. Western U. T. Co.*, 3 Dak. 315 ; *West v. Tel. Co.*, 39 Kas. 93.

^(b) 86 Tenn. 695.

If, however, the message does not show the sick person to be a relative, and no other notice of that fact is given, no recovery can be had for the mental suffering.^(*) Upon failure to deliver a message that a sick person is better, no recovery can be had for continued anxiety.^(b) No recovery can be had for mental anguish for failure to receive money transmitted by telegraph, without notice of facts making it natural that anguish would result.^(c) In *Logan v. W. U. Tel. Co.*,^(d) the plaintiff sued for non-delivery of a telegram sent by him to his son, summoning him home to the death-bed of his mother. On demurrer, it was held that plaintiff was entitled to recover at least nominal damages, "including the loss of the price of the telegram." But nominal damages in such cases, as stated above, could not include the price of the telegram. The latter always represents substantial damages, though under the most restricted measure.

§ 895. **Avoidable consequences.**—The rule that the plaintiff cannot recover for consequential losses which with ordinary care he could avoid applies in cases against telegraph companies as elsewhere.^(e) Under ordinary circumstances, the proper course for the sender on learning that his message has not been forwarded, is to repeat it.^(f) But the sender may not know that it has not been

(*) *McAllen v. Western U. T. Co.*, 70 Tex. 243; *Western U. T. Co. v. Brown*, 71 Tex. 723.

(b) *Rowell v. Western U. T. Co.*, 75 Tex. 26.

(c) *Western U. T. Co. v. Simpson*, 73 Tex. 422. For full discussion of this subject, see § 45.

(d) 84 Ill. 468.

(e) *Daughtery v. Am. Tel. Co.*, 75 Ala. 168; *Dorgan v. The Tel. Co.*, 1 Am. L. T. R. N. S. 406.

(f) *Daughtery v. Am. Tel. Co.*, *supra*; *De Rutte v. N. Y. A. & B. Tel. Co.*, 1 Daly 547, 560.

forwarded. It may be natural for him to act upon the supposition that it has been sent, but has failed to reach its destination. In such a case, if he is put to expense, this expense will be his measure of damages. So where plaintiff telegraphed to his attorney at Buffalo, "Hold my case till Tuesday or Thursday. Please reply," and getting no reply, after waiting a day, went to Buffalo, with counsel to try the case, at an expense including counsel fee of \$310, it was contended that he should have gone to defendant's office a second time; but it was held that defendant was responsible in this amount.^(*) In the opinion of Daly, C. J., this question is referred to as one of "contributory negligence." But the rule invoked by defendant was clearly that of avoidable consequences, as it affected, not the right of action, but the extent of recovery.

§ 896. **Exemplary damages.**—In a proper case exemplary damages may be recovered against a telegraph company. Thus when plaintiff was engaged in Cincinnati as a commercial news agent, furnishing to customers in that city financial and stock reports, which he obtained over defendant's wires from New York, it was held that he might recover exemplary damages for wilful delay in transmission of messages, for the purpose of giving precedence to other business of a rival agency.^(b)

§ 897. **Causa proxima.**—The rule of proximate cause is often of great assistance in defining the liability of telegraph companies. To ascertain whether any damages at all can be recovered,—*i. e.*, whether an action will lie,—the preliminary question must always be asked: whether the loss complained of arises from the act or omission of

(*) *Sprague v. Western Union Tel. Co.*, 6 Daly 200.

(b) *Davis v. Western U. Tel. Co.*, 1 Cin. Sup. Ct. 100.

the telegraph company, or of some intervening agency, or cause. Thus, where B. sent a dispatch to plaintiff asking for \$500, which the company by mistake changed to \$5,000; and B., on obtaining the latter sum, embezzled it and absconded, it was held by the New York Court of Appeals, that the loss was the result, not of the error in the transmission of the dispatch, but of B.'s independent act.^(a) And on the same principle in an action of contract, where there is no question of a breach, the operation of such an intervening cause would reduce the loss to a nominal sum.^(b)

^(a) *Lowery v. Western U. Tel. Co.*, 60 N. Y. 198; 2 Pars. Cont. * 257 *v.*

^(b) *First Natl. Bk. of Barnesville v. W. U. T. Co.*, 30 Oh. St. 555.

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